could draw a different inference from the facts from that which he has done, and there is therefore a reasonable possibility of success for the applicant, leave should be granted. If the possibility exists leave should also be granted without any hesitation or reluctance."

In view of the above it follows that a wrong test was applied in the case of the application presently under consideration and that the decisions in *S.* v. *Veldsman*, 1965 (1) P.H. H135 and *R.* v. *Kara*, 1961 (3) S.A. 116, to which I have referred, are wrong and should not be followed.

[The remainder of the judgment is of no importance to this report.]

The appeals of both accused are dismissed.

OGILVIE THOMPSON, C.J., and POTGIETER, J.A., concurred.

Appellant's Attorneys: *Magnus Macleod and Co.*, Kimberley.

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BESTER v. COMMERCIAL UNION VERSEKERINGSMAATSKAPPY VAN S.A. BPK.

(APPELLATE DIVISION.)

1972. *November* 9, 20. OGILVIE THOMPSON, C.J., BOTHA, J.A., HOLMES, J.A., JANSEN, J.A. and TROLLIP, J.A.

Negligence.—Damages.—When recoverable.—Shock or psychiatrical injury with consequent indisposition.—Recoverable if foreseeable. —Insurance.—Motor Vehicle Insurance Act, 29 of 1942.—Sec. 11 (1) (a).—*Shock or psychiatrical injury with consequent indisposition.—Damages for such damage recoverable if foreseeable.*

There is no reason in our law why somebody who, as the result of the negligent act of another, has suffered shock or psychiatrical injury with consequent indisposition, should not be entitled to compensation, provided the possible consequences of the negligent act should have been foreseen by the reasonable person who should find himself in the place of the wrongdoer. This does not refer to insignificant emotional shock of short duration which has no substantial effect on the health of the person, and in respect of which compensation would not ordinarily be recoverable.

As the result of the negligent driving of a motor vehicle insured by the respondent, the motor vehicle collided with appellant's son W (aged six) and as a result of the injuries he sustained he died on the same day. Appellant's son D (aged 11), who was running across the street about two paces in front of W, through having to behold the collision with W right behind him, had sustained serious shock which affected him psychologically and gave rise to an anxiety neurosis which had required medical treatment. Appellant had, *inter alia*, in his capacity as D's guardian, claimed R2 500 damages for shock and indisposition. In an appeal against the dismissal of the claim and the order as to costs,

Held, that appellant was entitled on D's behalf to compensation under the common law for the change of personality which D had sustained.

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The appeals of both accused are dismissed.

OGILVIE THOMPSON, C.J., and POTGIETER, J.A., concurred.

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Held, that appellant was entitled on D's behalf to compensation under the common law for the change of personality which D had sustained.

Held, further, as the brain and nervous system were part of the human body, that D had sustained a "bodily injury" within the meaning of section 11 (1) (*a*) of Act 29 of 1942.

Bester v. *Commercial Union Versekeringsmaatskappy van S.A. Bpk.*, 1972 (3) S.A. 68 (D), reversed.

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Appeal from a decision in the Durban and Coast Local Division (HENNING, J.). The facts appear from the judgment of BOTHA, J.A.

H. J. O. van Heerden, S.C., for the appellant: The Court *a quo* based its decision that damages were not recoverable for the emotional shock suffered by Deon on two grounds, viz.: (*a*) because according to South African law the causing of a shock is not actionable unless the shock arises from physical injuries or results in the impairment of a physical organism; and (*b*) because the words "bodily injury" in sec. 11 (i) of Act 29 of 1942 do not cover emotional shock.

Ad (*a*): The Court *a quo* relied in the first instance on an *obiter dictum* in *Waring and Gillow, Ltd.* v. *Sherborne*, 1904 T.S. at p. 348. If one looks at the rest of the *dictum*, it is not clear whether the Court had emotional shock as an acknowledged psychiatric disease in mind or merely the violation or disturbance of the emotions. It is not contended that Aquilian liability may arise from such a disturbance or violation which gives rise merely to fright, sadness etc; but that, as in the English law, damages may be claimed where the shock resulted in some kind of psychiatric disruption. *Hinz* v. *Berry*, (1970) 1 All E.R. at pp. 1075-6; *Behrens* v. *Bertram Mills Circus Ltd.*, (1957) 1 All E.R. at p. 596. It was positively stated in *Human* v. *Malmesbury Divisional Council*, 1916 C.P.D. at p. 220 that in common law damages could be claimed for causing an emotional shock, provided that it impaired the injured party's health or physical powers. Here, also, it is not clear whether the Court really intended to distinguish between "physical" and "psychiatric" diseases. Be that as it may, no direct common law authority for or against the proposition that the negligent causing of an emotional shock is actionable, could be found. The ambit of Aquilian liability was extended to include a claim for damages on account of injuries inflicted on a free man, even though no patrimonial loss resulted. Such damages could be claimed on the ground of pain and disfigurement. See also *Voet*, 9.2.11; De Groot, *Inleiding*, 3.34.2; van Leeuwen, *Romeinse Hedendaegse Reg*, 4.35.9. Should it be accepted that damages could not in our common law be claimed for the negligent causing of an emotional shock, the reason for this would be apparent: psychiatry was unknown and nobody would have believed that an emotional shock could lead to a psychiatric condition which is just as much a disease as any "physical" disease. In view of the gradual expansion of Aquilian liability there is in principle no reason why the negligent causing of an emotional

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shock should not be actionable in our present-day law. In fact, common law liability has in quite a number of instances been expanded. Damages

are for instance awarded in respect of loss of amenities of life, shortening of life expectancy, etc., although these cannot be termed "pain" or "disfigurement". Initially the *lex Aquilia* only applied to certain defined physical infringements in respect of corporeals, of which only the owner could claim under the *lex*. In the course of time the ambit of the Aquilian action had been considerably expanded by way of extensive interpretations of the *lex* and the granting of *actiones utiles* and *in factum*. For instance, Aquilian liability was coupled to any kind of physical infringement in respect of a corporeal and the wrongdoer was compelled to pay damages in respect of all patrimonial loss caused by him. In *Justinian's* time the said physical infringement was in general still a prerequisite, but the action was also granted to persons other than the owner. The action was even granted to an heir against the person who had destroyed the will. In Roman-Dutch law the requirement of physical infringement in respect of a corporeal was abandoned. For instance an *actio in factum* was granted against the *actuarius* who culpably neglected to comply with the formalities for the creation of a mortgage, and damages could be claimed by way of the Aquilian action where an *injuria* caused patrimonial loss. *D.* 9.2.41 pr; *Voet*, 20.1.11; 47.10.8; Van den Heever, *Aquilian Damages in South African Law*, vol. 1, pp. 8-29; *Alliance Building Society* v. *Deretilck*, 1941 T.P.D. at pp. 206-7; *Cape of Good Hope Bank* v. *Fischer*, 4 S.C. at p. 376. Because of this development it has been said that in common law Aquilian liability was extended in such a way as to include a claim for damages in respect of all damage caused culpably and without justification. *Cape of Good Hope Bank* case, *supra* at p. 376; *Matthews and Others* v. *Young*, 1922 A.D. at p. 504. In view of cases like *Herschel's* case this statement is probably over-optimistic. It is nevertheless not denied that Aquilian liability may by analogy be extended in South African law to bring the principles in line with modern conditions and ideas. *Herschel* v. *Mrupe*, 1954 (3) S.A. 464; *Union Government* v. *Warneke*, 1911 A.D. at pp. 664-5. The main argument against liability in respect of an emotional shock not producing purely physical results, is that such a situation can be easily simulated. Such practical considerations should, however, not bar a genuine claim, the more so as psychiatric conditions can to-day presumably be easily proved. Moreover, no deluge of actions followed the English recognition of liability in this respect. *Hambrook* v. *Stokes*, 1942 All. E.R. at pp. 116-7; *Dulien* v. *White and Sons*, 1900-03 All E.R. at p. 360F.

It is trite that where shock resulted from a physical injury negligently caused, damages may be claimed in respect of such shock. In such a case mention is often made of "parasitic damage". This condition can, how-

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ever, just as easily be simulated as in the case of a mere shock. *Creydt-Ridgeway* v. *Hoppert*, 1930 T.P.D. at p. 666; Flemming, *The Law of Torts*, 2nd ed., p. 158. There can be no reason in principle why a person

suffering a heart attack as the result of a shock should have an action, but not a person who, as a result of the shock, develops a psychiatric deviation which may possibly result in insanity. The one condition can be medically treated, the other psychiatrically, but both may be caused by the same act. The nerve or brain centre which has been affected in a psychic way is just as much a part of the physical body as, e.g., the heart. That is why it could already be said at the commencement of this century that emotional shock probably affected the physical organism and that it may be considered as a state of disease. *Dulien's* case, *supra* at p. 358; *Behrens'* case, *supra* at p. 596; *Owens* v. *Liverpool Corporation,* (1938) 4 All E.R. at p. 730; *Bourhill* v. *Young,* (1942) 2 All E.R. at p. 402; *King* v. *Phillips,* (1953) 1 All E.R. at p. 622; *Flemming, op. cit.,* p. 159; Walker, *Delict,* vol. 11, pp. 676-7. Once it is accepted that the negligent causing of shock is actionable, it is immaterial whether the shock resulted from the injured party's fear for his own safety or from his fear for another's safety or death. According to English law, however, the injured party must have been in a so-called danger zone. Only in such circumstances, so it is said, does a duty of care towards the injured party arise. *King's* case, *supra* at p. 622; *Bourhill's* case, *supra* at p. 399, 403 and 409; *Hambrook's* case, *supra* at p. 116; *Schreider* v. *Eisovitch,* (1960) 1 All E.R. 169; *Walker, op. cit.,* p. 682; Salmond, *Law of Torts,* 15th ed., p. 274. According to South African law the only relevant essential is that the causing of the shock must be reasonably foreseeable. The result of this requirement might well be that in most cases a person suffering a shock outside the danger zone would not be able to claim damages. *Cape Town Municipality* v. *Paine,* 1923 A.D. at pp. 216-7; *Mulder* v. *South British Insurance Co. Ltd.,* 1957 (2) S.A. at p. 449H.

Ad (*b*): According to the Court *a quo* the Legislature was aware of the fact that the Courts clearly distinguish between damage resulting from bodily or physical injuries and damage resulting from shock or psychological ailment and therefore the words "bodily injury" in sec. 11 were used indicating that only the former type of damage gives rise to an action. In 1942 there were only a few *obiter dicta,* and not very clearly formulated, which could possibly have been considered as an indication that our Courts were of the opinion at the beginning of the century that the mere causing of shock was not actionable. If the Legislature was aware of this, it was certainly also aware of the *dicta* in *Warneke's* case to the effect that the ambit of Aquilian liability could be extended in our law. It is much more likely that the Legislature used the said words in order to indicate clearly that damage caused to a corporeal fell outside the scope of sec. 11 (i). Shawcross, *Law of Motor Insurance,* 2nd ed., pp. 196 and 243, cited by Suzman and Gordon, *Law of Compulsory Motor Vehicle Insurance,* 2nd ed., p. 107.

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H. P. Viljoen, for the respondent: (1) It is trite that the ambit of Aquilian liability had been gradually extended in Roman, Dutch and

South African law, *inter alia*, by means of interpretation by the Courts. It must likewise be conceded that the Courts have the power to extend the ambit of the action. *Union Government* v. *Warneke*, 1911 A.D. at pp. 644-5; McKerron, *Law of Delict*, 7th ed., p. 6; Van der Merwe & Olivier, *Die Onregmatige Daad in die Suid-Afrikaanse Reg*, 2nd ed., p. 7. It must in the first instance be pointed out, however, that the expansion in question in all probability does not relate to the Aquilian action as such, but to an addition thereto from German and Dutch customary law. *Warneke's* case, at pp. 665-6; *Hoffa, N.O.* v. *S.A. Mutual Fire & General Insurance Company*, 1965 (2) S.A. at pp. 950H-952F. It is submitted that the Court will be loath to extend this clear exception to the rule that only patrimonial loss may be claimed on account of defendant's negligence. (2) Such authority as may be found in our case law seems to be against the extension of a claim for non-patrimonial loss. See *Warneke's* case, at pp. 665-6; *Waring and Gillow Ltd.* v. *Sherborne*, 1904 T.S. at pp. 348-9; *Hauman* v. *Malmesbury Divisional Council*, 1916 C.P.D. at pp. 219-220. That our Courts incline to a restrictive interpretation of the circumstances in which a person may claim on account of the negligence of another appears from their refusal to adopt the English approach concerning the rights of bystanders to claim damages. Neither in principle nor in equity is there any sound reason for allowing an action for psychological consequences flowing from an incorporeal injury. The group of sensitive persons who may be affected in this way, is probably small; the problem of refuting illegal claims of this nature will, naturally, be much greater than that of determining the measure of a plaintiff's pain and suffering or disablement flowing from discernible bodily injury; and to draw the line here is expedient and not contrary to practical considerations of equity. It is further submitted that the extent to which the boy's own fear and feeling of guilt on account of his brother's death contributed to his psychological condition, is fatal to his claim. (*a*) While English law recognises an action for impairing a person's feelings in respect of a threat against a third person, subject to certain limitations, our Courts have clearly rejected such a claim. Cf. *Hambrook* v. *Stokes Bros.*, 1942 All E.R. 110; *Schreider* v. *Eisovitch* (1960) 1 All E.R. at p. 175B; *Hinz* v. *Berry* (1970) 1 All E.R. 1074; *Waring & Gillow Ltd.* v. *Sherborne, supra* at p. 349; *Sueltz* v. *Bolttler*, 1914 E.D.L. 176; *Mulder* v. *South British Insurance Co. Ltd.*, 1957 (2) S.A. 444. (*b*) It is submitted that the approach of our Courts constitutes a sound limitation of liability for negligence. See the quotation from the American case of *Waube* v. *Warrington*, 98 A.L.R., at p. 499 in *Mulder* v. *South British Insurance Co. Ltd., supra*; 74 (1957) *S.A.L.J.* 263 at p. 265; *McKerron, op cit.*, pp. 156-7.

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(*c*) It seems that for the greatest part Deon's psychic impairment can be ascribed to the consequences of the shock and feeling of guilt caused by his brother's death. (*d*) As this cannot (according to the submission

above) give rise to any claim, the *onus* of proving that the boy had in fact feared for his own safety, lies on the plaintiff. (*e*) Even should the honourable Court be satisfied that the boy's psychic deviations could be ascribed to fear for his own safety, it would still be evident that a very substantial portion of his loss could not be recovered as it resulted from the effect his brother's death had on him. See the minority judgment of Lord JUSTICE CLERK at pp. 545 and 546 in *Currie* v. *Wardrop, (Scottish) Session Cases.*

Finally, concerning the Legislature's intention in enacting sec. 11 of Act 29 of 1942: It is submitted that this part of the argument coincides with what has been said above and that in using the words "bodily injury" the Legislature intended no more or no less than the common law meaning of these words. If what has been said above concerning the common law liability of a tortfeasor be accepted in respect of both the consequences of his act and the causing thereof, the use of the words "bodily injury" will not imply a wider consequence. Had it been the Legislature's intention to extend the meaning the words have according to respondent's submission, it would have been easy to add words indicating that psychic or mental injury also gave rise to an action. Should the Court find that the matter is to be remitted for determining the amount of loss, it is submitted that it should be remitted on the basis that only the loss suffered by the child in consequence of his fear for his own safety should be taken into account.

Van Heerden, S.C., in reply.

Cur. adv. vult.

Postea (November 20th).

BOTHA, J.A.: While appellant's two minor children, viz. Deon (11 years) and Werner (6 years) were running across Stella Road, Bellair, Durban on 3rd January, 1969, from east to west, a certain motor vehicle, driven by S. H. Kruger from south to north and insured by the respondent in terms of Act 29 of 1942, collided with Werner. Werner died later that day of the injuries sustained by him in the collision. At the time of the collision Deon, who was approximately two yards in front of Werner, had just crossed the street and the vehicle did not collide with him. According to the evidence the vehicle collided with Werner approximately one yard behind Deon and because he—so the Court *a quo* found—was himself in danger owing to the way in which Kruger drove the vehicle and because he had to witness the fatal accident immediately behind him, Deon suffered a serious shock affecting

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his psyche and leading to an anxiety neurosis which required medical treatment.

This gave rise to an action in which appellant claimed from respondent in the Durban and Coast Local Division—

(*a*) in his personal capacity—
  (i) the costs of Werner's funeral;
  (ii) R1 167,25 being medical costs and future medical costs for the treatment of Deon, and travelling expenses and future travelling expenses in connection with such treatment;
(*b*) in his capacity as Deon's guardian, R2 500 damages for shock and indisposition.

The Court *a quo* found that Kruger was negligent and that the respondent was liable in terms of sec. 11 (1) of Act 29 of 1942 to compensate appellant for costs incurred in respect of Werner's funeral. The claims in respect of Deon were, however, dismissed and appellant was ordered to pay respondent's costs less the costs of a one day trial in a magistrate's court where judgment was given in appellant's favour for R239.

Appellant now appeals to this Court against the dismissal of his claims in respect of Deon and the order as to costs.

In the Court *a quo* HENNING, J., held that according to South African law delictual damages could not be claimed for mental shock or psychological impairment where such shock or impairment did not result from physical injury, or did not lead to the impairment of a physical organism, i.e., physical disablement or impairment of bodily health. For this reason the claims in respect of Deon were dismissed—

"because his illness is purely psychological and in no way relates to any impairment of his physical organisms. This is the result although his condition in part resulted from shock sustained because of a threat to his own safety and in part because of what happened to his brother".

The learned Judge further held that the mental shock or psychiatrical injury which Deon suffered, did not amount to "bodily injury" within the meaning of sec. 11 (1) (*a*) of Act 29 of 1942 which was caused by or arose out of the driving of the insured motor vehicle, and that respondent was consequently not liable in terms of sec. 11 (1) to compensate Deon or his father for the loss suffered by them in consequence of Deon's indisposition.

Appellant testified that as a result of the accident on 3rd January, 1969 Deon underwent a drastic change of personality. Prior to the accident he had been a vivacious child and his relations with other children had been normal. He did very well at school. After the accident he became aloof, and aggressive. His schoolwork deteriorated badly. Since then he has been suffering from nightmares and cries in his sleep.

As from 5th October, 1970, Deon has been treated by Dr. Oberholzer, a general practitioner devoting most of his time to psychiatry in which field he is properly qualified. Dr. Oberholzer examined Deon physically, but failed to find any physical defect. From a psychiatric point of

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view Deon was very tense, he was very shaky and cried a lot. Dr. Oberholzer diagnosed an anxiety neurosis which, in his opinion, re-

sulted from the "psychiatric injury" or "emotional shock" suffered by Deon at the time of the accident on 3rd January, as a result both of the fact that Deon had been in danger himself and feared for his own safety and the fact that he had to witness the fatal collision with Werner immediately behind him, and the fear and feeling of guilt arising therefrom. Dr. Oberholzer could not determine the measure in which these factors had respectively contributed to Deon's emotional shock, although he was of the opinion that the second factor was more important and that the one factor aggravated the effect of the other. Deon was aware of his narrow escape. In relating the events to Dr. Oberholzer he referred to the accident of 3rd January, 1969, as the accident in which he and Werner had been involved.

Dr. Oberholzer gave Deon psycho-therapeutical treatment and referred him to the Children's Clinic in Pretoria for tests. According to Dr. Oberholzer, Deon will require further psycho-therapeutical treatment, at least until he attains the age of puberty.

Appellant's action is an action *ex delicto* for damages for shock, pain, suffering and disablement. General damages for impairment of physical integrity are claimed under the peculiar action which evolved in Roman-Dutch law due to the influence of Germanic customary law. (*Voet*, 9.2.11; *Grotius*, 3.34.2; *Union Government* v. *Warneke*, 1911 A.D. 657 at pp. 665-6; *Hoffa, N.O.* v. *S.A. Mutual Fire and General Insurance Co. Ltd.*, 1965 (2) S.A. 944 (C) at pp. 950 *et seq.*, and *Government of the R.S.A.* v. *Mgubane*, 1972 (2) S.A. 601 (A.D.) at p. 606). Concerning the claim for patrimonial loss, the action is the *actio legis Aquiliae*.

The alleged delict, *in casu*, the negligence of the driver of the insured vehicle, was not in issue in this Court. The unlawful causing of the alleged impairment of personality suffered by Deon was also not denied. The dispute was merely concerned with the question whether respondent was liable to pay special and general damages. Respondent's liability was denied on the ground that the loss arose merely from the emotional shock or psychiatric injury suffered by Deon at the time of the incident, and not from an ordinary physical injury, or because the emotional shock or psychiatric injury did not lead to an ordinary physical injury.

This contention presupposes that a psychiatric injury does not amount to a physical injury and means that although general damages may be claimed for emotional shock or psychiatric injury leading for instance to a heart attack, it may not be claimed where the emotional shock or psychiatric injury results for instance in insanity. This contention further means that a tortfeasor is not liable for loss, whether patrimonial or non-patrimonial, where such loss falls within a certain category. Such a contention is foreign to the principles of our law, and somewhat artificial in view of the fact that in Roman-Dutch law Aquilian liability has

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been extended to such an extent that damages may be claimed for all loss wrongfully and culpably caused. (*Matthews and Others* v. *Young*, 1922 A.D. 492 at p. 504.)

In *Cape Town Municipality* v. *Paine,* 1923 A.D. 207, INNES, C.J., said the following concerning liability for negligence, at p. 216: "....."

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That the test for liability for negligence is foreseeability, appears also from numerous other cases such as *Ocean Accident and Guarantee Corporation Ltd.* v. *Koch,* 1963 (4) S.A. 147 (A.D.) at p. 152; *Herschel* v. *Mrupe,* 1954 (3) S.A. 464 (A.D.) at pp. 474, 475; *Van den Bergh* v. *Parity Insurance Co. Ltd. and Another,* 1966 (2) S.A. 621 (W) at p. 624; *Kruger* v. *van der Merwe and Another,* 1966 (2) S.A. 266 (A.D.) at p. 272; *Botes* v. *Van Deventer,* 1966 (3) S.A. 182 (A.D.) at p. 191, and 1949 (66) *S.A.L.J.* at pp. 172 *et seq.* A tortfeasor is not liable for inforeseeable consequences. The doctrine of foreseeability of loss does not imply that the exact nature and extent of the loss should have been foreseen. It is sufficient if the tortfeasor should have foreseen the general nature of the loss which could be caused by his act. (*Kruger* v. *Van der Merwe and Another, supra* at p. 272, and *S.* v. *Bernardus,* 1965 (3) S.A. 287 (A.D.) at pp. 302, 307).

It is trite procedure in our Courts to award special and general damages for shock, pain and suffering, disfigurement, loss of amenities of life and shortening of life expectancy where this relates to a purely physical injury. (See *Government of the R.S.A.* v. *Ngubane, supra* at pp. 605, 606). It is apparently also trite that where a person has suffered a purely physical injury as well as an emotional shock general damages may be awarded for the shock although the latter in no way relates to the physical injury. (See *Creydt-Ridgeway* v. *Hoppert,* 1930 T.P.D. 664 at p. 666). To refuse an injured party an action for special or general damages on the ground only that the emotional shock and consequent suffering do not coincide with a purely physical injury, can hardly be defended on logical grounds.

The first case on which the Court *a quo* relied was *Waring and Gillow, Ltd.* v. *Sherborne,* 1904 T.S. 340. In that case the plaintiff claimed damages, *inter alia,* for the shock she sustained on reading in a newspaper of the negligent killing of her husband. In connection with this claim INNES, C.J, said at p. 348: "....."

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It is clear that plaintiff's claim was dismissed because the loss was too remote or unforseeable and not because the emotional shock and consequent suffering did not coincide with a purely physical injury. The first part of the passage cited deals with general damages for purely mental suffering or injured feelings not coinciding with physical injury, and not with general damages for physical injury resulting from an emotional shock. (Cf. *Union Govt.* v. *Warneke, supra* at p. 666).

In *Hauman* v. *Malmesbury Divisional Council,* 1916 C.P.D. 216, a case on which the learned Judge *a quo* also relied, the defendant used

explosives near a public road. Because he feared for his own safety the plaintiff, a medical doctor who travelled on the said road, suffered severe mental and emotional shock causing him since that time much pain and necessitating medical treatment. His capabilities and status as a doctor were seriously and detrimentally affected with the result that he lost practically the whole of his practice.

The jury awarded the plaintiff damages. Summing up to the jury KOTZÉ, J., said, *inter alia,* the following, at p. 220: "....."

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Two of the four questions posed by the Judge were: "....."

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The intention of the Judge in using the words "bodily health and strength", "physical organism", "physical health and bodily activity" is not quite clear. It is not at all clear that he only referred to a purely physical condition. According to the report of the case plaintiff's condition did not arise from a purely physical injury and in plaintiff's particulars of claim (at p. 217) there is no allegation that the emotional shock sustained by him resulted in a purely physical injury. It is therefore quite possible that the learned Judge referred to plaintiff's psychic condition, which merely resulted from fear and emotional shock and which did

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not coincide with a physical injury. Viewed in that light the learned Judge's summary to the jury affords no authority for the proposition that general damages may not be claimed for emotional shock or psychiatric injury unless it coincides with a physical injury and that case can, in principle, hardly be distinguished from the present one.

Deon's bodily fitness or health was impaired by the emotional shock or psychiatric injury sustained by him in the same way as Hauman's bodily health was impaired by the emotional shock sustained by him. It cannot be said that Deon's bodily health has not been impaired by the events of 3rd January, 1969. One who suffers from an anxiety neurosis, who cannot sleep peacefully, whose school work deteriorates appreciably and whose social relations with others are disturbed, does not enjoy normal physical health. The emotional or mental system is, in any case, just as much a part of the physical body as is an arm or a leg and an injury to the emotional or mental system is just as much an injury to a physical organism as is an injury to the arm or leg.

Modern English case law also rejects the erstwhile distinction between emotional shock and bodily injury. In *Bourhill* v. *Young,* (1942) 2 All E.R. 396 Lord MACMILLAN said in this connection, at p. 402: "....."

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In *Owens* v. *Liverpool Corporation* (1938) 4 All E.R. 727, Lord MCKINNON said, at p. 730: "....."

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Consequently damages may be claimed for emotional shock and psychiatric injury in modern English law. (*Hinz* v. *Berry*, (1970) 1 All E.R. 1074; *Behrens* v. *Bertram Mills Circus Ltd.* (1957) 1 All E.R. 585, and *Bourhill* v. *Young, supra*). In the latter case Lord MACMILLAN said the following at p. 402: "....."

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In this Court it was not contended, and rightly so, that the fact that Deon did not come into contact with the insured vehicle, in any way barred his claim for general damages. (See *Creydt-Ridgeway* v. *Hoppert, supra* at p. 665).

For the above reasons I hold that there is no reason in our law why somebody who, as the result of the negligent act of another, has suffered shock or psychiatric injury with consequent indisposition, should not be entitled to compensation, provided the possible consequences of the negligent act should have been foreseen by the reasonable person who should find himself in the place of the wrongdoer. This does not refer to insignificant emotional shock of short duration which has no substantial effect on the health of the person, and in respect of which compensation would not ordinarily be recoverable.

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It was, however, contended on behalf of the respondent that the claims in respect of Deon could in any case not succeed because of the fact that Deon's emotional shock or psychiatric injury and consequent anxiety neurosis resulted mainly from his fear and feelings of guilt consequent upon witnessing his younger brother's fatal accident, and only to a lesser degree from the threat to his own safety and fear for personal injury. It was contended that although damages could in English law in certain circumstances and subject to certain limitations be claimed for emotional shock consequent upon the negligent injuring or killing of a relative (see *Hinz* v. *Berry, supra*), the South African Courts had consistently dismissed claims for general damages on account of emotional shock. For support of this statement reference was made to *Waring and Gillow Ltd.* v. *Sherborne, supra* at p. 349; *Sueltz* v. *Bolttler*, 1914 E.D.L. 176 and *Mulder* v. *South British Insurance Co. Ltd.*, 1957 (2) S.A. 444 (W).

As I have already pointed out the plaintiff's claim in the first case was dismissed because the loss was in the circumstances considered to be too remote or unforeseeable. (See at p. 349). It is also clear from the *Bolttler* case that the *ratio* for dismissing plaintiff's claim for damages in respect of his wife's miscarriage and indisposition consequent upon emotional shock resulting from the fact that she had to witness the plaintiff being injured negligently, was that, in the circumstances, this consequence was too remote (see at pp. 180, 181).

In *Mulder's* case DE WET, J., said the following at p. 449: "....."

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(The underlining is mine).

Although it seems that after considering English case law plaintiff's claim was dismissed with reference to the English doctrine of "duty of care", it is nevertheless clear that the general *ratio* for the dismissal was the unforeseeability, in the circumstances, of the injury. From the passage cited it is also clear that the learned Judge did not lay down a general rule to the effect that someone who suffered loss because of an emotional shock consequent upon seeing, or hearing of, an accident caused by the negligent driving of a vehicle, may in no circumstances claim special or general damages. Whether or not general or special damages may be claimed depends on the question whether the loss which ensued was foreseeable in the particular circumstances of each case.

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It may be that where the injury arises from an emotional shock caused by the tortfeasor's negligent act which endangered the prejudiced person himself, one may more readily conclude that the tortfeasor should have foreseen the injury than where the emotional shock was caused through the prejudiced party's having to witness or hear of another's danger. It can, however, not, without more ado, be accepted that the injury was foreseeable in the one case, but not in the other.

If a reasonable driver would have foreseen the injury and loss suffered by Deon and his father in the circumstances of this case, then special and general damages may be claimed, although the exact nature and extent of the injury and loss were not foreseeable.

The Court *a quo* found that Deon's safety had been endangered by the negligent driving of the insured vehicle and it is clear from the evidence that he had a narrow shave and had reason to fear, and did in fact fear, for his own safety. This in itself was, according to Dr. Oberholzer, sufficient to cause the emotional shock and psychiatric injury. It is, however, also clear from Dr. Oberholzer's evidence that the fact that Deon had to witness Werner's fatal accident—approximately one yard behind him—played the dominant role in causing his condition. According to Dr. Oberholzer the one factor aggravated the effect of the other.

The reasonable driver in the position of the driver of the insured vehicle would in the circumstances have foreseen the danger to Deon and the possibility of the impairment of his rights of personality and would have taken steps to guard against it. The exact nature or extent of the damage or loss need not have been foreseen. The fact that Deon's fear for the safety of Werner and his feeling of guilt on witnessing the fatal accident contributed more to his condition than fear for his own safety does not render the consequences of the negligent driving of the insured vehicle less foreseeable.

I consequently hold that appellant is entitled on Deon's behalf to compensation under the common law for the change of personality which Deon sustained.

Although special or general damages have heretofore as far as I know, never been awarded by our Courts in a similar case, with the possible exception of *Hauman* v. *Malmesbury Divisional Council, supra,* the award of special and general damages in this case cannot be considered as an extension of the *actio legis Aquiliae* or of the peculiar action which evolved in Roman-Dutch law for claiming general damages for impairment of personality, but only as an application to the facts of this case of trite legal principles. As I have already pointed out, it is well established in our case law to award damages for emotional shock

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where such shock coincided with physical injury. If damages can in such a case only be claimed where a physical injury has been sustained, the origin of such limitation is unknown and in any case indefensible.

If a person is in common law entitled to damages for an emotional shock or psychiatric injury, negligently caused, which results in an anxiety neurosis, and I am of the opinion that he is, it can hardly be contended that such a person is not entitled to damages in terms of sec. 11 (1) of Act 29 of 1942 where the emotional shock or psychiatric injury "was caused by or arose out of" the negligent driving of a motor vehicle, in view of the object of the Act. In any case, as I have already endeavoured to show above, the brain and nervous system form part of the human body and therefore a psychiatric injury constitutes a "bodily injury" within the meaning of sec. 11 (1) (*a*) of Act 29 of 1942. There is much force in appellant's contention that the expression "bodily injury" in sec. 11 (1) was used in contrast to damage to a corporeal and not in contrast to a psychiatric injury.

Respondent is therefore bound to compensate Deon and his father in terms of sec. 11 (1) of Act 29 of 1942 for their loss. The appeal must therefore succeed.

Counsel agreed that should the appeal succeed the case should be remitted to the Court *a quo* for determining the loss. It was contended on behalf of the respondent that the remittal should take place on the basis that only the loss suffered by Deon in consequence of his fear for his own safety should be determined by the Court *a quo*. From what I have said above it follows in my opinion that such an order cannot be justified in the circumstances of this case. Deon and his father are entitled to be compensated for all the loss they have suffered as a result of the accident.

The appeal succeeds with costs. The order of the Court *a quo* is set aside. The case is remitted to the trial Court to determine all the loss, including the amount of R239 already awarded for funeral expenses suffered by the appellant and Deon and to make a suitable order as to costs.

OGILVIE THOMPSON, C.J., HOLMES, J.A., JANSEN, J.A. and TROLLIP, J.A., concurred.

Appellant's Attorneys: *Jacob Viljoen & Partners,* Durban; *Symington & de Kok,* Bloemfontein. Respondent's Attorneys: *Livingston, Doull & Winterton,* Durban; *Webber & Newdigate,* Bloemfontein.

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S. v. RADEBE.

(APPELLATE DIVISION.)

1972. *September* 19; *November* 11. RUMPFF, J.A., WESSELS, J.A. and MULLER, J.A.

**Criminal procedure.—Trial.—Duty of Judge.—Must carry out his task fearlessly.—Assault on Judge.—Refusal to recuse himself not an irregularity.—Criminal law.—Persons, liability of.—Mental state.—Such raised by accused.—Scope and applicability of secs.* 28 *and* 29 *of Act* 38 *of* 1916.

Whereas a presumption exists that a Judge will carry out his task fearlessly it would be impossible to hold that a threat or an attempt to assault a Judge pure and simple was a fact which in general would materially affect the impartiality of the Judge. The refusal of such a Judge to recuse himself is not an irregularity.

The scope of sections 28 and 29 of Act 38 of 1916 and when they should be applied, discussed.

Appeal against a conviction in the Durban and Coast Local Division (MULLER, J.). Facts of no importance have been omitted.

G. B. Muller, Q.C. (with him *J. J. Lapping*), for the appellant, at the request of the Court: "....."

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J. S. Jansön, for the State "....."

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Muller, Q.C., in reply.

Cur. adv. vult.

Postea (November 11th).

RUMPFF, J.A.: The appellant in this case was convicted of murder without extenuating circumstances, *inter alia,* and sentenced to death. He