REPORTABLE

CASE NO. SA 30/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINSTER OF BASIC EDUCATION, SPORT

AND CULTURE **APPELLANT**

and

SUSANNAH VIVIER, N.O. **FIRST RESPONDENT**

MARIA MAGDALENA DIERGAARDT **SECOND RESPONDENT**

Coram: Maritz, JA, Strydom, AJA *et* Mtambanengwe, AJA

Heard on: 7 April 2008

Delivered on: 29 June 2012

APPEAL JUDGMENT

MARITZ, J.A.:

[1] This appeal lies against an order for the payment of damages and costs made against the appellant by Hoff, J in the High Court. The Court held that the appellant

(then, cited as the “defendant”) was vicariously liable for the delictual conduct of officials employed in the Ministry of Basic Education, Sport and Culture at a public school hostel for children with intellectual and developmental disabilities.

[2] The first respondent is a legal practitioner at the Bar, cited both here and *a quo* (there as “first plaintiff”) in her nominal capacity as curator *ad litem.* She was appointed by the Court to institute and act in the legal proceedings against the appellant on behalf of a former pupil at the school, to whom I shall refer as "Sarah"[1]. Sarah is a special child. Born of an uncaring mother and handicapped from birth by a spinal defect and severe mental impairment, life’s challenges were always going to be tougher for her than for most. And, as is apparent from the facts and evidence in this case, they were. Her limited cognitive abilities retarded her ability to acquire communication skills; constrained the development of adaptive behaviour commensurate with her physical growth and age; limited her capacity to recall and relate information and experiences; reduced her ability to address and resolve problems presenting themselves in her social interaction with others and the like. Given the uncharitable attitude exhibited by some towards with children suffering mental disabilities and their vulnerability to social, sexual or economical exploitation, it was important that Sarah should grow up in a sheltered social setting where, in her own time and in accordance with her limited cognitive and functional abilities, she could be taught – and hopefully learn – the most basic skills needed to lead a functional and meaningful life.

[1] This is not her real name or a variant thereof.

[3] During Sarah's early years, such a setting, by and large, was provided by the second respondent, her grandmother (the "second plaintiff in the Court below). She stepped into the void left by an absent father and uncommitted mother. She assumed the onerous duties and responsibilities as Sarah's principal caregiver and acted as her guardian. But, as Sarah got older, she also had to obtain educational skills which children are taught at school and the social skills acquired when they interact with teachers and their peers. Unfortunately, she made no progress at a local school in Rehoboth where she was initially enrolled. Her attendance at that school was euphemistically characterised as "problematic." On the advice and through the intervention of the school principal, she was placed at a public school in Windhoek which was equipped and staffed to tend specifically to the needs of children with learning disabilities. Unfortunately, her move to a school far away from home also necessitated her placement in the hostel attached to the special school. I interpose here to note that I have refrained, quite deliberately, from mentioning the name of the second respondent or of the special school which "Sarah" attended. Disclosure of these names carries with it the risk that she may be identified. Given the account of events which is to follow, publication of her real name or other information that may lead to her identification is bound to cause her further psychological trauma. It is therefore directed that any publication of this judgment or of the facts thereof shall not reveal the real name of "Sarah", that of her grandmother or any other information about her which is likely to result in her identification by persons other than those involved in or associated with this case.

[4] During the 9 years Sarah attended this special school, she made slow and very limited progress. The hard reality is that, by the time she was 17 years of age, she still had the psyche and mentality of a pre-school child. A clinical psychologist, who testified at the trial, described her intellectual impairment as “severe”. By all accounts, she was a very vulnerable child - in the circumstances of this case, not despite her age, but, more so, because of it: Given the combination of a physically mature body and a mental disability which diminished her understanding of social rules, her sense of propriety and her inhibitions to conduct herself within those constraints, there was a real and ever-present risk that she could become the victim of sexual exploitation by callous individuals. This, the respondents claim, is exactly what happened to her.

[5] In the particulars of their claims, the respondents aver that the Ministry, which the appellant headed in his nominal capacity, owed Sarah a legal duty to supervise, protect and keep her from harm during her residency at the school hostel. This duty notwithstanding, employees of the appellant, acting within the course and scope of their employment at the hostel but in breach of the duty of care and the hostel rules, wrongfully and negligently failed to take care of Sarah at the hostel over an out-weekend during the currency of a school term. Instead, the hostel superintendent, acting without the second respondent’s permission, allowed an institutional worker at the hostel (to whom I shall refer as “Mina”) to take her along for a weekend. Over that weekend, they claim, Sarah was raped or indecently assaulted by a male teacher (the “teacher”) employed at the school who - it later transpired - also happened to be

Mina's live-in boyfriend at the time. As a result, Sarah suffered severe emotional shock and trauma and had to receive extensive medical and psychiatric treatment. In addition, the second respondent had to incur medical expenses for Sarah's treatment and she too, it is claimed, suffered emotional shock when she learned that her ward – and grandchild - had been sexually abused by the teacher. The resultant damages, they allege, were reasonably foreseeable and, therefore, the first respondent claimed payment of N$200 000.00 on behalf of Sarah (the "first claim") and the second respondent claimed payment of N$51 346.70 (the "second claim").

[6] Before I turn to the proceedings in the Court *a quo*, I must note at the outset that, but for the conduct of the staff members implicated in the commission of the delict, the Ministry's response to the allegations of sexual abuse by one of the teachers in its employ must be commended. Senior officials in the Ministry assisted in reporting the complaint to the Women and Child Abuse Centre of the Namibian Police; visited Sarah in hospital; called on the second respondent at home to express sympathy, offer their support and assure her that the complaint would be fully investigated. They also informed the Office of the Prime Minister of the incident and requested that the teacher implicated in the wrongdoing be suspended pending the outcome of an investigation. They, thereafter, initiated an investigation into the alleged misconduct. The Ministry did not seek to suppress the allegations or to smooth over the claimed abusive conduct by one its staff members. They treated the complaint with the seriousness it justified; took immediate remedial steps and expedited the investigation which, ultimately, culminated in a disciplinary hearing. At

the hearing, evidently conducted in accordance with fair and proper procedures, no less than nine persons – including two experts – testified and their testimonies were duly recorded. In a detailed and reasoned summary of the evidence, the disciplinary committee came to the conclusion that the teacher had sexually abused Sarah and, for that reason, found him guilty of misconduct for having acted in contravention of several sections of the Public Service Act, 1995 regulating the conduct of public servants[2]. The Committee forwarded its recommendation to the Prime Minister's Office and the Prime Minister, acting thereon, dismissed the teacher.

[7] In the pleadings exchanged *a quo,* the appellant did not challenge the allegation that the hostel superintendent had allowed Mina to take Sarah along for the out-weekend but took issue with most of the other allegations underpinning the respondents' claims. The appellant denied that the hostel superintendent or Mina acted wrongfully or negligently in breach of their legal duties and, in particular, took issue with the respondents' allegation that the hostel superintendent did not have a discretion under the "Hostel Guide for Principals of Government Schools and Superintendents of Government Hostels" to approve of and allow the weekend's arrangement.

[8] When the action was brought to trial, the respondents were represented by Ms Conradie, Mr Narib acted on behalf of the appellant. In the Court's judgement which

[2] The conclusion, being essentially an opinion on the general merits of the case which the Court *a quo* was called upon to decide, was, of course, inadmissible as evidence and will be disregarded as irrelevant in the adjudication of the appeal. See: *Prophet v National Director of Public Prosecutions*, 2007 (6) SA 169 (CC) 188C-D at par [43].

followed[3] a hearing over several days, Hoff J summarised the evidence and thereafter carefully analysed it with specific reference to each of the constituent elements of a delictual action under common law to ascertain whether the respondents discharged the *onus* they bore on a balance of probabilities. The reasoning of the Court on each of these elements was informed by Sarah's mental disability; the symptomatic behavioural manifestations thereof which I have expounded on earlier in this judgment and her consequential vulnerability to exploitation.

[9] These considerations were also factored into the assessment of her credibility and the reliability of her evidence. After analysis, the Court *a quo* accepted Sarah's evidence that she had been raped by the teacher. The Court rejected Mina's evidence that her boyfriend had not been alone with Sarah during the weekend and that he had had no opportunity to perpetrate the asserted acts. Hoff J concluded that the probabilities favoured Sarah's evidence. In support of that finding, he referred to the changes in Sarah's conduct after she had been returned to the hostel on the Sunday and during the days that followed; the fact that, under the circumstances, she had reported the incident to her aunt and the second respondent within a reasonable time; the opinion expressed by medical experts who treated her afterwards that she had been severely traumatised and the testimony of a clinical psychologist that, given the level of her mental disability and the manner in which she consistently conducted

[3] Reported as *Vivier NO and Another v Minister of Basic Education, Sport and Culture,* 2007 (2) NR 725 (HC).

herself after the event, she could not possibly have fabricated her account of the incident.[4]

[10] Turning to the element of wrongfulness, the Court *a quo* acknowledged[5] the general principle that a person's omission to prevent harm to another is not unlawful unless the former is under a legal duty to act positively to prevent the harm and fails to do so[6]. Whether a legal duty to act exists, the Trial Judge reasoned, falls to be objectively assessed in the circumstances of each case with reference to the contemporaneous legal convictions of the community concerned including, but not limited to, the expression they find in prevailing legal principles, instruments, pronouncements and policies. With this approach in mind the Judge *a quo* examined the educational policy regarding the supervision of hostel children in the interest of their safety and security as expressed in the hostel guide. The Court noted that the second respondent specifically enquired from the hostel superintendent whether Sarah could stay in the hostel over the out-weekend and, having assented to that request, the superintendent no longer had a discretion to allow another person to take

---

[4] In par [24] of the judgment.

[5] Amongst others, with reference to *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae),* 2003 (1) SA 389 (SCA) at 395H - 396D; *Knopp v Johannesburg City Council,* 1995 (2) SA 1 (A) at 27F – I and *Minister of Safety and Security v Van Duivenboden*, 2002 (6) SA 431 (SCA) para 17 at 444.

[6] See also *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 (SCA) at [44] in this regard where Brand AJ held as follows: "The principles regarding wrongful omissions have been formulated by this court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty.
The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages."

Sarah out for the weekend without the knowledge or consent of the second respondent. In the Court's assessment of the community's legal conviction, it was reasonable to expect that the superintendent should have acted to prevent Sarah's removal from a controlled and supervised hostel-setting into harm's way. The Court concluded that the superintendent acted in breach of the Ministry's policy and the hostel guide. Moreover, the Court reasoned,[7] the *boni mores* takes into account the ability of a person to look after him- or herself in potentially harmful circumstances and, therefore, demands a higher standard of care and imposes a more onerous obligation on caregivers to prevent harm from coming to children generally, and disabled ones in particular. The Ministry and superintendent, it held, had such a duty towards Sarah and, not knowing the circumstances under which Sarah would be accommodated by Mina over the weekend, should not have consented to her removal, especially not when supervision was available at the hostel over the weekend at no additional costs to the Ministry. The collective weight of these considerations persuaded the Court that the hostel superintendent acted in breach of the Ministry's legal duty to protect Sarah from harm – and therefore wrongful - when she allowed Mina to take Sarah along for the weekend.

[11] On the issue of negligence, the Court *a quo* acknowledged[8] that liability will only arise if a *diligens paterfamilias* in the position of the hostel superintendent (a) would have foreseen the reasonable possibility of her conduct causing injury to Sarah and to

[7] By parity of reasoning with reference to Boberg, *The Law of Delict,* vol 1 at 355.
[8] With reference to the authoritative test of negligence as formulated by Holmes JA in *Kruger v Coetzee*, 1966 (2) SA 428 (A) at 430E - G

the second respondent's person or property thereby causing them patrimonial loss and (b) would have taken reasonable steps to guard against such an occurrence, which steps the hostel superintendent neglected to take. It noted[9] that foresight as to the exact nature and extent of the damage was not required and that it would suffice if the general manner of its occurrence was reasonably foreseeable. In this context too, the Court *a quo* emphasised that Sarah was a vulnerable person due to her intellectual disability and held that a reasonable superintendent should have foreseen that harm might befall Sarah should she be permitted to stay with Mina over the weekend. She knew that the second plaintiff had specifically requested that Sarah should stay in the hostel for the weekend - which was permitted in terms of the policy guide of the Ministry – and, not knowing the circumstances under which Sarah would be accommodated at Mina's house, a reasonable person in her position would have guarded against such harm by refusing permission for Mina to take her along.

[12] Turning to the issue of causation, the Court *a quo* embarked on an instructive analysis of a long line of authorities dealing with both the factual and legal elements thereof;[10] the theories of adequate causation and reasonable foreseeability developed to define the ambit of ensuing legal liability and the more recent flexible approach to the limitation of liability informed by policy considerations and the notions of

[9] With reference to: *Kruger v Van der Merwe and Another,* 1966 (2) SA 266 (A) at 272E – F; *Minister van Polisie en Binnelandse Sake v Van Aswegen,* 1974 (2) SA 101 (A) at 108E-F and *Robinson v Roseman,* 1964 (1) SA 710 (T) at 715G – H.

[10] Amongst others: *Tuck v Commissioner of Inland Revenue,* 1988 (3) SA 819 (A) at 832G – I; *Van Duivenboden, supra,* para 25 at 449E; Neethling, Potgieter and Visser, *Law of Delict,* 5th ed. at 171; Snyman, *Criminal Law* 4th ed. at 81 and the authorities referred to therein.

reasonableness, fairness and justice.[11] In applying these considerations, the Court *a quo* again underlined that Sarah "was a mentally retarded child with the intellectual abilities of a preschool child and was very vulnerable and one would have expected that special care be taken and precautionary measures put in place in order to prevent that harm might befall her".[12] It again pointed out that the hostel superintendent did not know what type of environment Sarah would be exposed to and who she might encounter during her stay with Mina. The Court concluded that on the application of either one the reasonable foreseeability test or the adequate causation test, the conclusion remained inescapable that the damages suffered by Sarah and the second respondent were causally linked to the superintendent's decision to permit "a mentally retarded child to accompany an un-authorised adult to stay in an unknown environment where the child might come into contact with unknown characters".[13]

[13] Finally, the Court discussed the quantum of damages to be awarded. It relied on the expert evidence given by the medical doctor and psychologists who examined and treated Sarah after the incident to assess the extent of her physical and psychological injuries. On all accounts she was severely traumatised, feared that she might be killed and suffered from insomnia and hysteria. Referring to the objective of compensatory awards and the fair but conservative approach of Courts in the

---

[11] Expounded in *Standard Chartered Bank of Canada v Nedperm Bank Ltd,* 1994 (4) SA 747 (A) at 764; *Road Accident Fund v Russell,* 2001 (2) SA 34 (SCA) at 39; *Barnard v Santam Bpk*, 1999 (1) SA 202 (SCA) at 215 - 7; *Ebrahim v Minister of Law and Order,* 1993 (2) SA 559 (T) at 564 – 6 and *Gibson v Berkowitz and Another,* 1996 (4) SA 1029 (W) at 1040 - 41

[12] At 747B-C of the judgment.

[13] At 747E of the judgment.

determination thereof,[14] it assessed the damages with reference to awards in similar matters[15], made inflationary adjustments and, bearing in mind the distinctive and special circumstances of this case, made the following order:

> "1. In respect of the first claim: The defendant is ordered to pay the amount of N$80 000 to first plaintiff.
>
> 2. In respect of the second claim: The defendant is ordered to pay the amount of N$25 000 and the amount of N$1 346.70 (past medical expenses).
>
> 3. The defendant pays plaintiffs' costs of suit."

[14] The appellant noted an appeal "against the whole of the judgement and the orders". This wide and sweeping challenge, which would have allowed the appellant to take issue with virtually every conceivable finding by the Court *a quo* on appeal, was significantly moderated in argument. Appellant's counsel, Mr Mostert, made it clear that the appellant was taking issue with the order by the Court *a quo* on the three grounds only: that the Court *a quo* erred (a) in finding that Sarah had been raped or indecently assaulted; (b) in holding that the second respondent had suffered emotional shock because of Sarah's abuse and (c) in awarding unreasonably high damages to the second respondent. The appellant did not seek in argument to challenge the findings of the Court *a quo* on any of the other elements of the respondents' claims in delict. On the contrary, Mr Mostert conceded in his heads of argument submitted on behalf of the appellant that, if the Court *a quo* had correctly

---

[14] Citing *Bay Passenger Transport Ltd v Franzen,* 1975 (1) SA 269 (A) at 274F – H.
[15] Referring to *N v T*, 1994 (1) SA 862 (C).

held that the evidence established on a balance of probabilities that Sarah had been raped or indecently assaulted, it would be "the end of the matter as far as the merits are concerned in respect of the appeal against the first respondent and, consequently, the appeal should be dismissed.". In what follows, I shall only deal with the narrowed and more focused challenges now being advanced by the appellant. I do not propose to deal with and, therefore, should not be understood to either approve or disapprove of the other findings of the Court *a quo*: they are not at issue in the appeal.

[15] The only evidence of the rape or sexual assault which has given rise to this claim is that sworn to by Sarah. There were no eyewitnesses to support her claim; she was not examined by a medical doctor shortly after the incident to ascertain whether she had suffered physical injuries and there were no samples or smears taken for forensic analysis to ascertain whether the results would lend credence to her account. On this, the most crucial issue in the case, she is a single witness.

[16] Moreover, Sarah's physical appearance and age notwithstanding, the extent of her mental impairment requires that her evidence must be considered as that of a preschool child. The approach of the Courts in assessing the credibility of child witnesses and the reliability of their evidence is informed by the evidential risks associated with their, as yet, inchoate social, emotional and intellectual abilities: their suggestibility and imaginativeness;[16] their capacity to accurately observe, remember,

[16] Compare: *R v Manda*, 1951(3) SA 158 (A) at 163A-C

recollect and relate events and experiences; their appreciation of the duty and importance of being truthful when testifying and their, sometimes, incomplete comprehension of the - often complex - matters which they are required to testify about.[17] These evidential concerns must always be individualised when Courts assess the evidence of child witnesses but, given the gradual maturation of children's social skills and of their emotional and intellectual abilities from infancy to adulthood, it normally[18] follows naturally and logically that the younger a child witness is, the more pronounced these concerns become and the greater the measure of care required from the Court in assessing the reliability of their evidence.

[17] These judicial concerns and, I should add, also those which arise when the Prosecution is seeking a conviction on the evidence of a single, uncorroborated witness, require of Courts to make a guarded assessment of the veracity and reliability of the testimonies given by such witnesses in criminal proceedings. As a rule, this cautionary approach has consistently been applied in this jurisdiction.[19] Not,

---

[17] Diemont JA dealt with the considerations which may influence the Court's assessment of the trustworthiness of young witness' evidence as follows in *Woji v Santam Insurance Co Ltd,* 1981 (1) SA 1020 (A) at 1028B-E: "The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness … depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears 'intelligent enough to observe'. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has 'the capacity to understand the questions put, and to frame and express intelligent answers' . … There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest - is there a consciousness of the duty to speak the truth?" See also: *R v W*, 1949(3) SA 772 (A) at 780 and *R v J*, 1958(3) SA 699 (SR) at 702A.

[18] Subject to other factors, such as intellect, health, education, stimulation, environment, etc., that may conceivably affect the pace of a child's maturation.

[19] See: *S v Katamba*, 1999 NR 348 (SC) at 361E and *S v Monday*, 2002 NR 167 (SC) at 195I where O'Linn AJA said: "Consequently, I hold that Courts must still abide by the cautionary rule relating to the

it should be noted, as a formalistic procedural requirement to which mere lip service must be paid, but as an intrinsic part of a broader logical and reasoned inquiry into the substance of the evidence against the accused: After due appreciation and assessment of the peculiar and inherent dangers to convict the accused on the evidence of the single/child witness who testified at the trial, is the evidence of that witness, when considered in the context of and together with all other evidence adduced at the trial, sufficiently credible and reliable to prove the guilt of the accused beyond reasonable doubt? This cautionary approach, as Holmes JA pointed out in *S v Artman and Another,* [20] -

> "does not require the existence of implicatory corroboration: indeed, in that event she would not be a single witness. What was required was that her testimony should be clear and satisfactory in all material respects; … I would add that, while there is always need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense."[21]

[18] The reasons underlying the judicial practice to assess the evidence of single/child witnesses in criminal proceedings with care equally apply to their testimonies in civil proceedings. Hence, but for the impact of a lesser burden to prove the wrongdoing, the cautionary approach finds equal justification. The effect of the

---

testimony of young children as contained in our existing law of evidence and laid down and in authoritative decisions of the South African and Namibian Courts."

[20] 1968(3) SA 339 (A) at 341C as regards the application of the cautionary rule in respect of single witnesses in criminal prosecutions. According to Kirk-Cohen J (in *Director of Public Prosecutions v S*, 2000(2) SA 711 (T) at 715C-D) this approach apply not only to single witnesses, but equally to evidence in sexual offences involving minors.

[21] In *S v Artman and Another,* 1968 (3) SA 339 (A) at 341A-C. Compare also: *R v T*, 1958 (2) SA 676 (A) at 678.

civil standard of proof on the need for corroboration before reliance may be placed on their evidence was illustrated in *Woji v Santam Insurance Co Ltd*, *supra* (at 1027 *in fine* – 1028C) by Diemont JA as follows:

> "There is no statutory requirement in our law that a child's evidence must be corroborated …. Nor, for that matter, have the Courts "acted upon a rigid rule that corroboration should always be present" before a child's evidence is accepted - see SCHREINER JA in *R v Manda* 1951 (3) SA 158 (A) at 163. That was a criminal matter as were all the other cases cited by counsel in argument. Where the action is not criminal but a civil one in which the burden of proof is not so onerous, there is even less cause to insist that the child's evidence should be corroborated."

[19] The appellant's appeal against the finding of the Court *a quo* that Sarah's implicatory evidence about the teacher's wrongful conduct was sufficiently reliable to find in favour of the respondents on a balance of probabilities falls to be considered on the basis of this cautionary approach as it finds application to the evidence of single child witness in civil proceedings. On the authority of *R v Dhlumayo,*[22] Mr Mostert conceded at the outset that this Court would not interfere with the credibility findings made by the Court *a quo* unless it is satisfied, on adequate grounds advanced, that they were wrong[23]. He, however, contended that the Court *a quo* erred by attaching too much weight to the opinion evidence of the expert witnesses

---

[22] 1948 (2) SA 677 (A) at 696 and 705-706. Cited with approval on numerous occasions in this jurisdiction: C.f. *S v Gey Van Pittius,* 1990 NR 35 (HC) at 40C; *Ostriches Namibia (Pty) Ltd v African Black Ostriches (Pty) Ltd,* 1996 NR 139 (HC) at 151F; *S v Jonkers,* 2006 (2) NR 432 (SC) at 537F and, more recently, in *S v Simon,* 2007 (2) NR 500 (HC) at 512E – to mention a few.

[23] Compare: *Wessels v Johannesburg Municipality*, 1971 (1) SA 479 (A) at 482G and *Marine and Trade Insurance Co Ltd v Mariamah and Another,* 1978 (3) SA 480 (A) at 486E both cited with approval by Wessels JA in *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd,* 1979 (1) SA 621 (A) at 624A.

that Sarah did not fabricate the event in support of its conclusion that Sarah's evidence on that issue was reliable.

[20] Sarah told her story in terse and basic terms: She found herself alone with the teacher in the bedroom of Mina's house late the Saturday evening of that fateful weekend. Mina had left earlier to visit her aunt. The teacher asked her to pull down her pants and suggested to her that they must have fun (Afrikaans: "jol") together. He had full intercourse with her. Afterwards, he told her not speak about what they had done and threatened to kill her if she would. The next morning, he took her back to the hostel.

[21] Were these events real or imaginary? This was perhaps the most fundamental factual issue which the Court had to ultimately decide. That being so, was the opinion evidence of expert witnesses on that very issue admissible and, if so, how much reliance could the Court have placed on their opinions in making its own findings on the issue? Clearly, when a witness is not better positioned or qualified than the Court to form and express an opinion on facts, events or circumstances relevant to the case, his or her views on the issue at hand would simply be supererogatory and, as such, irrelevant and inadmissible[24]. At the other end of the spectrum, are cases where the issues relate to "subjects upon which the court is usually quite incapable of

[24] The underlying reason for this "eminently practical" exclusionary "opinion rule" has been advanced by Wigmore in a passage cited with approval in *R v Vilbro and Another*, 1957 (3) SA 223 (A) at 228D-E:

> "It simply endeavours to save time and avoid confusing testimony by telling the witness: 'The tribunal is on this subject in possession of the same materials as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary, and merely cumbers the proceedings.'"

forming an opinion unassisted".[25] In between the two extremities of cases where opinion evidence is impermissibly supererogatory, on the one hand, and indispensably necessary, on the other, a whole spectrum of incremental relevance or irrelevance may be found, depending on the degree of assistance to be derived by the Court from the opinions expressed on the issue at hand. The admissibility of opinions falling within this spectrum must be determined on a case by case-basis, regard being had to the nature of the issue which must be adjudicated; the ability of the Court itself to draw inferences and form opinions based on the facts presented to it in evidence; the qualifications, knowledge and experience of the witnesses who express the opinions; the reliability and authority of the opinions expressed and the measure of assistance the Court can derive from them in the adjudication of any given case – to name a few. It is within these parameters that the admissibility of the expert evidence and the permissible degree of reliance placed thereon by the Court *a quo* must be assessed. With this in mind, I must briefly summarise the salient facts and circumstances on which the expert witnesses in this case based their views that Sarah's version of the events was not a fanciful invention.

[22] Upon Sarah's return to the hostel, she complained of a headache to one of the staff and was given tablets to take after lunch. She felt nauseous and did not eat anything, scratching through the food on her plate and, slumped forward over the table, rested her head on her arms during lunch. After having taken the tablets, she went to her room to lie down but later returned to ask for – and was given - a sanitary

[25] To use the words of Wessels JA in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 370G.

pad because she was bleeding. She also did not eat anything at supper the evening and, afterwards, went to her bedroom where she covered her head with a blanket. Some of the staff noticed that her behaviour was out of character but thought that she was menstruating and upset because the second respondent had not collected and taken her home for the weekend. When they tried to speak to her, she did not respond other than by covering her head with the blanket.

[23] In the days that followed the teaching and hostel staff became increasingly concerned about her continuing unusual behaviour: She showed no appetite; was withdrawn and quiet most of the time; would suddenly become aggressive, lash out and beat other children. When in her room, she would cover her head with the blanket. So concerned did they become that they reported her behaviour to the school principal. When, later in the week, the second respondent came to pay her dues at the school, she was denied permission to speak to Sarah because it was thought by the teaching staff that Sarah was angry with her and that the visit will upset her even more. She only saw Sarah from a distance and observed that she was crying.

[24] When, about a week later, the second respondent collected Sarah at school for the holidays, it was apparent from the outset that Sarah did not want to return to the hostel after the holidays. Once at home, she immediately noticed that Sarah's behaviour was quite uncharacteristical. She was quiet, withdrawn and had very little appetite. She walked about restless and, as if waiting for someone, kept on looking

through the bedroom and kitchen windows. She slept very little and, when she did, she was restless, shivering and, at times, shaking. Repeated enquiries as to what was the matter with her only met with silence and a blank stare. The second respondent eventually imposed on her daughter (Sarah's aunt) to speak to her. Only then did Sarah first tell her aunt and, afterwards, also the second respondent, what had happened to her and about the threat made to her life should she tell anyone about the incident. Not immediately knowing how to respond to the report, they tried to reassure her when she was anxious and to calm her down when she was aggressive. The next day, the second respondent went with Sarah to the principal's house to report the incident. Unfortunately, the principal was out of the country at the time. That night, she did not sleep at all because Sarah was very afraid and continuously repeated: "He will come, he will come!".

[25] The following day, at her wit's end, she took Sarah to the State Hospital. At the hospital, Sarah became hysterical, grabbed hold of a nurse's clothes and tore them. She was kept in the hospital for observation and a gynaecological examination. The examination proved to be impossible because of Sarah's resistance to an internal examination. Because of her mental state, she was transferred to the forensic psychiatric section of the hospital where she was placed under heavy sedation in a cell. When she emerged from sedation the next day, she repeatedly fearfully shouted that the man will come. She was kept under sedation in the psychiatric section of the hospital and, on all accounts, was evidently not well, soiling herself and wetting her bed. Eventually, the second respondent could not bear it any longer and, with the

assistance of the school principal, who, by then had returned, she obtained an appointment with Dr Terblanche and reported the matter to the Woman and Child Abuse Branch of the Namibian police for investigation.

[26] Dr Terblanche, a medical doctor with considerable practical experience in the area of psychiatry was the first of the expert witnesses with whom Sarah consulted. She was brought to him by the second respondent and the school principal at the beginning of September, approximately one month after the incident. They were evidently concerned about Sarah's psychological well-being and – what they thought were - disturbing indications of neglect in her treatment at the hospital. When he saw her the first time at his practice, Sarah could not walk or talk. She was so cramped up that he could not examine her properly. His clinical diagnosis was that she was suffering from a combination of anxiety and the severe side-effects of medication administered at the hospital. He prescribed different medication and consulted her again four days later. On that occasion he conducted a physical examination of her and, as part thereof, conversed with her in order to make a more accurate diagnosis of her physical and psychological condition and to refer her for further treatment. In the course of the conversation, she related to him what had happened to her but, given the lapse of time since the event, he could not determine whether she had been violated.

[27] After her first consultation with Dr Terblanche, Sarah was taken home. While she was being cared for at home, she fearfully insisted that all the doors and windows

should be closed and that the curtains should be drawn. She did not want to be alone, not even when she had to use the toilet. At home, she was visited and consulted by Dr Dippenaar at the directions of the appellant. Dr Dippenaar is an educational psychologist in the employ of the appellant, registered as such with the Council of Psychology and Social Work in Namibia. Children are the focus of her work. She also authored and presented a dissertation on "Sexual Abuse of Learners by Teachers in Namibia" in support of her doctoral candidature. During her first visit, she found that Sarah was still under the influence of sedatives but nevertheless, extremely agitated. To establish a connection with Sarah and calm her down, she started to brush Sarah's hair and, eventually, Sarah confided in her about the event and also told her about the threat to her life. She repeated the threat over and over, like a mantra. In her expert opinion, Sarah's fear was real to her and she was truly very scared of being killed.

[28] By the time of her visit the following day, the effect of the medication had run its course and she observed that Sarah was both anxious and extremely depressed. She was unable to sit still or to lie down for any length of time, was clinging to her at times, pushing her away at others and making the most awful crying sounds throughout her visit. Although Sarah had shown signs of anxiety prior to disclosure of the incident to the second respondent (for instance, by pulling the blanket over her head and her difficulty to sleep), Dr Dippenaar opined that the disclosure of the event to the second respondent and others was probably the trigger to her heightened psychological state of stress, anxiety and fear. Considering her psychological state of mind, her conduct

and her level of mental retardation, Dr Dippenaar stated that, in her professional opinion, Sarah had not fabricated the story she told about her experience at the hands of the teacher. Because her mandate, given by the appellant, was only to lend temporary support to Sarah, she decided to refer Sarah to Dr Whittaker for treatment.

[29] Dr Whitaker is a registered clinical psychologist holding both a Masters and Doctors degree in clinical psychology. He consulted Sarah for the first time on 19 September 2002 and, thereafter, had four further therapy sessions with her. He immediately diagnosed her as suffering from post-traumatic stress disorder. His clinical impression was that she had been severely traumatised by an event which was unusually traumatic to her; that she was intensely distressed and deeply frightened and, as a result, presented conditions of irritability and aggressive behaviour; that she was hyper vigilant and constantly monitoring her environment because she was feeling afraid and unsafe and she was suffering deep emotional pain which manifested itself at times in uncontrollable crying. Because she was so overwhelmed by her fears and anxieties and suffered severe insomnia and nightmares, she simply could not keep herself together anymore and disclosed the traumatic experience two weeks after the event when, for the first time she was at home with persons she trusted. Regard being had to the intellectual level she was functioning at, her limited cognitive abilities, her low level of self-sufficiency and limited communication skills, he also concluded that she fulfilled the diagnostic requirements for severe mental retardation and was actually functioning at the level of a preschool child despite her age.

[30] Given Sarah’s disability, he was very careful not to pose leading questions during consultations with her. He allowed her to relate events in her own words. She did not tell him at the outset about the incident. He later ascertained that her reluctance was mainly driven by the fear she had that the teacher would follow through on the threat he had made against her life should she tell. Given the degree of cognitive disability she suffered and the seriousness of the post-traumatic stress symptoms she consistently manifested prior to and throughout the numerous sessions he had with her, his clinical conclusion – put forward in very definite terms during his testimony – was that neither Sarah’s version of the event nor her symptoms were confabulated. Assessed against diagnostic criteria universally recognised and applied, he was most definite in his conclusion that she was genuinely and severely traumatised by the incident and the threat made against her life. Real fear, occasioned by the threat, kept the incident uppermost in her mind and added to the trauma experienced. When, under cross-examination, he was asked about the consistency in the language she used to relate the incident, Dr Whittaker noted that he found it compatible for a person with her cognitive disability, limited vocabulary, "limited thinking" and limited communication skills.

[31] As evident as Sarah's disability must have been to the Trial Judge when listening to her evidence given in terse and, sometimes, naively vulgar terms, the determination of the precise cognitive level at which she was functioning as an individual must have fallen outside the Judge’s area of competence or experience.

The level at which Sarah was functioning was a consideration most relevant to her ability to invent, present and consistently maintain by pretence and subterfuge the symptoms of a person suffering from post-traumatic stress disorder. This is one of those cases where, although the Trial Judge might have been able to form a general impression about the nature of Sarah's disability, expert evidence on the precise level of her cognitive functionality and the bearing it has on her capacity to invent a fictional traumatic experience, devise and consistently present pretended psychological symptoms clinically associated with post-traumatic stress disorder must have been of substantial assistance to the court in assessing the credibility and reliability of Sarah's evidence as a single/child witness[26]. In my view, the opinions expressed by the expert witnesses on the cognitive abilities, language and social skills, behavioural conduct and the psychological condition of Sarah were therefore relevant to the cautionary assessment of her evidence and, therefore, admissible.

[32] The gravamen of the appellant's complaint, if I understand Mr Mostert correctly, is not so much directed at the Court's admission of the experts' opinion evidence, but more at the degree of reliance placed thereon. In seeking to advance this contention, appellant's counsel criticised the Trial Judge's reliance on the opinions of the experts in which they excluded the possibility that the incident could have been fabricated by Sarah. Closer analysis of the context in which reference was made to those opinions,

[26] In their discussion of the Wigmore-*Vilbro* approach on the admissibility of opinion evidence, one of the propositions advanced by Zeffert & Paizes (*The South African Law of Evidence*, 2nd ed. at p 316) is that "where the court is able to reach some sort of independent conclusion, but the opinion of an expert (or a knowledgeable layman …) would be of 'appreciable' or 'great' assistance to the court in reaching it as an individual, the opinion is relevant and the court is entitled to receive it."

however, shows that the Court did not place undue reliance thereon. Reference was made to those views as one of multiple considerations why the Court concluded that the probabilities favoured Sarah's version above that of Mina. The Court also considered and detailed the numerous “visible behavioural changes” in Sarah’s conduct after her return to the hostel (most of which I have referred to earlier in this judgment); Sarah's demonstrated fear of being injured or killed; the fact that she was, by all accounts, severely traumatised by an event; the fact that she related details of the incident to her aunt and the second respondent within a reasonable time. Regard being had to all of these considerations, the Court *a quo* concluded that, if Mina’s evidence was true (i.e. that the teacher had not had an opportunity to perpetrate the act with Sarah), then the behaviour of Sarah "remains an enigma for which there is no plausible explanation". The Court went on to consider the fact that Mina had a motive to protect the teacher (her boyfriend) since, in doing so, she was also looking after her own interests. On all of these considerations, the Court *a quo* ultimately concluded that the probabilities favoured acceptance of Sarah's version of the events. It seems to me that the Court *a quo* only referred to the opinions expressed by the experts on the possibility of fabrication as one of many other considerations why it held that the Sarah’s evidence is to be preferred on the probabilities in the case. Appellant’s advanced contention of undue reliance is therefore without substance.

[33] I must immediately add that, even if this Court would have been at liberty to consider the evidence afresh, it would have arrived at the same conclusion. The uncharacteristic behaviour of Sarah after her return to the hostel as set out earlier in

this judgement; her demonstrated level of anxiety before disclosure of the event to the second respondent; her heightened fear of reprisal after disclosure; the symptoms of insomnia, lack of appetite, stress and even hysteria which she manifested; her reluctance to return to the hostel after the holidays, all indicated that she suffered a traumatic experience shortly before. That experience is the one she related to the second respondent and her aunt as soon as she found herself in a safe environment - away from Mina and the teacher -amongst persons she knew she could trust. She thereafter consistently repeated the details of her experience at the hands of the teacher to a number of witnesses and to the Court. In doing so, she did not seek to exaggerate the wrongfulness of the teacher's conduct: she did not even suggest that he had used any force to subdue her or that he had taken her modesty without consent. Moreover, the language she used to described the incident, vulgar and physiologically inexact as it were, is marked by a measure of naïveté which has a ring of truth to it. There is virtually no possibility that those details could have been suggested in those terms to her by persons she had spoken to afterwards – all of whom, one would expect by reason of their higher intelligence, wider experience and more sophisticated communication skills, would have articulated such a deed in more physiologically accurate and refined terms.

[34] Absent the evidence of the teacher, who was not called as a witness by the appellant, Mina's denial of opportunity was the strongest evidence advanced on behalf of the appellant in defence of the respondents' claims. Mina, as the Court *a quo* reasoned, had personal motives to deny that the teacher had opportunity to

perpetrate the act: not only might she have had residual reasons for protecting her live-in boyfriend at the time of the incident but, having taken Sarah from a protected institutional environment to her home for the weekend, she had the responsibility to ensure that, as a vulnerable sexually mature child with limited adaptive skills, Sarah should not be exposed to a situation where she may be sexually exploited. Her failure to do so, she might well have feared, could have had implications on her position as an institutional worker at the school and, as the principal admittedly suggested to her, that she might lose her pension.

[35] The only other evidence tendered in support of the appellant's defence was that of the matron at the hostel. She testified that when Sarah had been dropped off by the teacher on the Sunday morning she was seemingly contend and had no complaints. She recalled that she had specifically asked Sarah whether Mina had left her alone and she responded that Mina had been with her all the time. She did not notice on that day - or on any of the days that followed - that Sarah was not feeling or eating well. On this and other aspects her evidence seems to differ from the preferred and supported evidence of other witnesses. But, even if one accepts the initial observations she made on Sarah's return and the details of the conversation she claimed to have had with her, the import thereof must be considered in context of the fact that the teacher had dropped Sarah off at the hostel only a few moments earlier. With the teacher's threat of retribution still ringing in her ears, it was to be expected that Sarah would have put up a brave face and, even if invited, would have declined to admit to any untoward conduct by the teacher or, for that matter, by Mina.

[36] In the result, I remain unpersuaded that the Court *a quo* misdirected itself in the manner contended for by the appellant's counsel. As it is, the view I take of all the evidence about the incident accords with the conclusion of the Trial Judge on that issue, i.e. that the first respondent proved on a balance of probabilities that she had been sexually molested by the teacher in the manner alleged in the Particulars of Claim. Inasmuch as this finding is the only issue pursued in the appeal against the award made by the Court *a quo* in favour of the first respondent, it follows that the appeal against that part of the order falls to be dismissed.

[37] What remains, is the appeal against the quantum of the award made on the second claim in favour of the second respondent. Counsel for the appellant, Mr Mostert, does not cavil with the general proposition that compensation may be awarded for emotional shock, as contended for by Ms Conradie on behalf of the second respondent[27]. He also conceded that, in appropriate cases, such an award may be made in favour of a parent who suffered emotional shock as a consequence of actionable trauma inflicted on his or her child – as had happened in the case of *N v T*[28] on which counsel for the second respondent relied. However, relying on *Barnard v Santam Bpk*,[29] he submitted that a detectable psychiatric injury, reasonably

[27] With reference to *Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal,* 1996 (2) SA 37 (W); *Gibson v Berkowitz,* 1996 (4) SA 1029 (W); *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A); *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) and *Boswell v Minister of Police and Another* 1978 (3) SA 268 (E).
[28] 1994(1) SA 862 (C) at 864H.
[29] 1999 (1) SA 202 (SCA).

foreseeable, must be proven as a rule by supporting psychiatric evidence for such a claim to succeed.

[38] In *Road Accident Fund v Sauls*[30] Olivier JA pointed out that there was no public policy limitation to a plaintiff's claim for damages based on the negligent causation of emotional shock and resultant detectable psychiatric injury "other than a correct and careful application of the well-known requirements of delictual liability and the onus of proof." Even in cases where, in addition to the harm or loss suffered by the primary victim, the actionable delict also caused a detectable psychiatric injury which was reasonably foreseeable to a secondary victim, damages may be allowed. Following the remarks of Lord Keith of Keinkel in his speech in *Alcock and Others versus Chief Constable of South Yorkshire Police,*[31]he held that it would not be justifiable to limit such a claim "to a defined relationship between the primary and secondary victims, such as parent and child, husband and wife, etc…" but noted that, "in determining limitations a court will take into consideration the relationship between the primary

[30] 2002(2) SA 55 (SCA).

[31] [1992] 1 AC 311 (HL) at 397C-F where he said: "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 bound 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."

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".[32]

[39] As I have pointed out at the outset, the second respondent stepped into the shoes of Sarah's natural parents as her primary caregiver and, on all accounts, had a close and caring relationship with her. The bond between the two of them tied them together as closely as those binding natural parents and their children. The relationship between the second respondent and Sarah was also well-known to the responsible staff members at the special school and hostel. It was therefore reasonably foreseeable that, should they wrongfully and negligently act in breach of their duty of care towards Sarah and harm of the nature evidenced in this case would befall her, that the second respondent may also suffer emotional shock causing her detectable psychiatric injury or disturbance.

[40] Accepting, as I do, that the second respondent established that she had standing to sue for damages as a secondary victim of the appellant's delict vicariously committed by the Ministry's employees and that such damages were reasonably foreseeable, the only remaining question is whether she proved on a balance of probabilities that she had in fact suffered a detectable psychiatric injury as a result of the actionable delict. It is common cause that no psychiatric evidence was presented to the effect that she had suffered any psychological lesions or disturbances. Her own

[32] Para [17] of the judgment.

evidence on this score was very limited. She testified that she did not send Sarah back to school after the holiday because she "encountered a shock for the negligence of the … school staff". When prompted by a further question to express her feelings about what had happened to Sarah, she said that she "was very much bitter" and disappointed that “such a thing could have happened”. She later added that she was also unhappy about the treatment Sarah had received at the hospital and that it had been onerous for her to attend to Sarah’s needs during that time.

[41] Given the proven nature of the emotional and caring relationship which the second respondent had with Sarah, I accept that the second respondent suffered emotional shock when she learned what had happened to her grandchild as a result of the hostel staff's wrongful and negligent conduct. This is also evidenced by her demonstrated concerns for Sarah's physical and psychological health and the manner in which she sought professional assistance in the days and months that followed. The difficulty, in the absence of supportive psychiatric evidence, is to assess the measure of the psychiatric injuries suffered by her and, based thereon, to quantify her damages. In the absence of supportive expert evidence and further amplification of the actual psychological effect which the delict had on the second respondent as a secondary victim, the award of damages should have been be constrained accordingly by the Court *a quo*. Mr Mostert pointed out, correctly in my view, that the Court *a quo* did not bear these considerations in mind and did not individualise the second respondent’s damages for emotional shock and trauma. It merely followed the precedent of an award in default judgement proceedings in the case of *N v T* (*supra*)

and, after inflationary adjustments, made the same award in this case. In the circumstances the award of N$25 000 was not properly individualised with regard to the paucity of evidence adduced during the trial and, in my view, should be reduced to N$10 000.00.

[42] Costs, in the case of the appeal against the order made in favour of the first respondent's claim on behalf of Sarah, must follow the result. The respondents were represented by the Legal Assistance Centre and, therefore, costs should be limited to disbursements. Inasmuch as the appeal against the order made in favour of the second respondent is successful in part, the costs of the appeal should be dealt with differently. Mr Mostert correctly submitted that the success of the second respondent's appeal, by and large, "hinge(d) on the success of the first respondent's case". The principal issue on which counsels' industry and arguments were focused was whether the respondents had proven on a balance of probabilities that Sarah had been molested in the manner pleaded. On that issue, I found in favour of the respondents. It follows that that appeal against the award of past medical expenses to the second respondent in the amount of N$1346.70 must also fail. Although the appeal against the quantum of general damages awarded to the second respondent succeeds in part, that aspect of the appeal did not receive similar attention as the principal issue and did not take up much time in argument. In the circumstances, I do not propose to make any order of costs as regards the appeal against the order in favour of the second respondent.

[43] In the premises, the following order is made:

1. The appeal against the award of $80,000.00 to the first respondent in her representative capacity is dismissed with costs, such costs to be limited to disbursements.

2. The appeal against the award of damages to the second respondent succeeds in part and

2.1 paragraph 2 of the order of the High Court is set aside and the following order is substituted:

"2. In respect of the second claim:
The defendant is ordered to pay second plaintiff damages in the amount of N$11 346.70.";

2.2 no order of costs is made in the appeal against this award.

MARITZ, J.A.

I concur.

_____
STRYDOM A.J.A.

I concur.

_____
MTAMBANENGWE A.J.A.

ON BEHALF OF THE APPELLANT:	Mr C Mostert
Instructed by:	Government Attorney
ON BEHALF OF THE RESPONDENT:	Ms L Conradie
Instructed by:	Legal Assistance Centre