

**DAMAGES FOR DEPRIVATION OF  
PARENTAL CARE: INITIATING A  
GROUNDBREAKING NEW REMEDY  
FOR CHILDREN**

***M v Minister of Police* 2013 (5) SA 622 (GNP)**

## **1 Introduction**

In South Africa, as in many other jurisdictions, it is well established that where a parent is unlawfully and culpably killed by a third party any surviving children may claim for loss of support. Detailed rules on damages available in terms of the common law loss of support action have developed over a long period of time (see, eg, Visser and Potgieter *Law of Damages* (1993) 374–385). However, the action has generally remained subject to a major limitation. The loss which can be claimed for must be pecuniary or material. This is in accordance with the principle that only patrimonial damages may be awarded in terms of the loss of support action (*Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T); and see also Visser and Potgieter *Law of Damages* 382). Thus, damages which can be claimed by children unlawfully deprived of a parent are restricted to compensation for loss of future maintenance they will no longer receive. In reality, the harm and deprivation children experience after death of a parent tend to be much more than what has been recognized as suitable for compensation by means of patrimonial damages. Particularly where there was a close relationship, bereavement may cause long-term emotional harm. The child may also lose out on important life-skills training and guidance that the parent would foreseeably have provided for many years until the child reached maturity. Without such guidance, the child may never achieve his or her full potential. So the child may be significantly disadvantaged even beyond maturity.

Unfortunately, in the face of centuries of entrenchment of the law, our courts have been unable to extend the loss of support action to fully cover all aspects of a deprivation of nurturing. They have thus not been able to address some of the most severe dimensions of harm typically suffered when children are wrongfully deprived of parents. South Africa has not been alone in this. Such claims are blocked by the Fatal Accidents Act 1976 in England, where damages can only be claimed for pecuniary loss. Although this was criticized by the Court in, for example, *Hay & Anor v Hughes* ([1974] EWCA Civ 9), there appears currently to be no attempt to amend the Act. Similar legislation in Australian states and territories also does not make provision for claims by children for non-pecuniary damages. This is with the exception of the Northern Territory of Australia where the Compensation

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(Fatal Injuries) Act allows a child to claim damages for loss of care and guidance of a parent wrongfully killed.

Fortunately, in the democratic era South Africa has benefited from an infusion of modern, children's rights-based legislation. Some of the new statutory provisions allow for a reconceptualization of the law governing parent-child relationships. Of foundational importance is the declaration that "every child has the right – ... to family care or parental care ..." in section 28(1)(b) of the Republic of South Africa Constitution Act, 1996. As will be further discussed below, the actual content of parental care has been to some extent clarified in section 15 of the Children's Act 38 of 2005 (the Act).

The references to parental care in modern South African legislation provide scope for judges to develop the detail of the law in accordance with a children's-rights approach. In *M v Minister of Police (M)* Mohle J grasped an excellent opportunity to do so and opened the way for future compensation of children for non-material aspects of parental loss. He did this with creative and ground-breaking interpretations of section 28(1)(b) of the Constitution and section 15 of the Act. In our discussion we provide an analysis and appreciation of the judgment. We show that, whilst *M* is important for its initiation of a new remedy from which many children can benefit in the future, it is in some respects less than perfectly clear, and therefore leaves important aspects for further development. We consider the implications of the judgment and how South African law needs to be further evolved if children unlawfully deprived of their parents are to be fully compensated for resulting harm.

## 2 The facts and claims

The facts of *M* are disturbing. Damages claims arising from loss of a father were brought by two mothers, each on behalf of her minor child. Both children were fathered by the same man – one WM. WM, who was the breadwinner, was arrested for allegedly stealing four motor vehicle tyres and wheel trims. He was placed by the police in a cell with 19 other men. He was severely attacked that night by some of the other detainees, whilst others sang to disguise the sounds of the attack (par 6.2. Unless otherwise indicated all paragraph references are to the *M* judgment.) He was released the following morning after the police discovered that he had in fact bought the tyres and trims legally. He was in pain at the time of his release. His relatives took him to a doctor who referred him to hospital, where he died later that same day (par 6.3). He had previously been healthy, and the cause of his death was injuries suffered during the attack.

The mothers, acting in their own capacity and as guardians of their children, claimed compensation from the Minister of Police for loss of support. In addition, they claimed constitutional damages on the ground that their children had been deprived of their constitutional right to parental care when their father was wrongfully killed. As a basis for the constitutional damages they relied on section 28(1)(b) of the Constitution. This provides every child with the right "to family care or parental care, or to appropriate alternative care when removed from the family environment". The plaintiffs

argued that their children had been deprived of parental care through the death of their father as a result of the negligent conduct of the police in not protecting him from assault whilst he was in their custody. The children's rights had consequently been infringed and accordingly they were entitled to appropriate relief in the form of constitutional damages. The claim for loss of support was settled between the parties and presented to Court; but there was no agreement on the claim for constitutional damages, which then formed the sole matter to be decided by the Court.

### 3 Reasoning of the Court

The Court noted that the basis for claims for constitutional damages is section 38 of the Constitution (para 11). This states that “[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights”. Of significance is the broad scope of the words, “appropriate relief”. In the instant case, section 38 of the Constitution needed to be read with section 15(1) of the Children’s Act (38 of 2005). The latter provision can be interpreted as supporting application of the former in cases involving children. Section 15(1) aligns with section 38 because it states “[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights”.

Having noted that section 15(1) opens the way for constitutional damages claims in matters falling within the scope of the Act, the Court proceeded to consider three previous reported cases in which constitutional damages had been sought (although not for loss of parental care). It noted that the first application for such damages was made in *Fose v Minister of Safety and Security* (1997 (3) SA 786 (CC) (*Fose*)). Although it was based on an interpretation of section 7(4) of the Interim Constitution and no damages were actually awarded, *Fose* was nevertheless significant because of the Constitutional Court's finding that the wording, “appropriate relief”, does potentially include damages awards (par 14). In the second case, a landowning company contended that it had lost the use of a portion of its land through unlawful occupation where its rights could have been restored through timeous state action. The case was first reported as *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* (2004 (6) SA 40 (SCA)). When subsequently heard by the Constitutional Court it was reported as *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* (2005 (5) SA 3 (CC)). Both the Supreme Court of Appeal and Constitutional Court awarded, *inter alia*, constitutional damages as appropriate relief. In the third case of *MEC, Department of Welfare, Eastern Cape v Kate* (2006 (4) SA 478 (SCA)) the Court also granted constitutional damages against the State – in this instance, where payment of a disability grant had been inexplicably delayed. Having reviewed the three precedents, Mohle J concluded “[it] is

clear that the law in South Africa recognizes that constitutional damages may be awarded as appropriate relief in compensation for loss suffered as a consequence of the unlawful infringement of a constitutional right. In this regard a court may fashion a new remedy and make an award in the form of constitutional damages as appropriate relief to compensate for an infringement of a constitutional right” (par 18).

However, although there was judicial precedent for other types of matters, and even a gateway provision in section 15(1) of the Act itself, a question that remained was whether constitutional damages should be awarded specifically for “infringement of the constitutional right to family care or parental care” (par 18). In deciding this, Mohle J considered that it was essential to understand in more detail the meaning of the phrase “family or parental care” in section 28(1)(b) of the Constitution. To appreciate the content of family or parental care, it was necessary to consider the list of legal responsibilities arising from having care of a child as contained in section 1 of the Act (par 19). As noted by the Court, these are described as:

- “(a) within available means, providing the child with –
  - (i) a suitable place to live;
  - (ii) living conditions that are conducive to the child's health, well-being and development; and
  - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring the best interests of the child is the paramount concern in all matters affecting the child.”

The Court reasoned that what is significant about this list is its inclusion of rights going well beyond what the common law of delict caters for. The latter, in providing relief only for material and financial deprivation caused by death of a parent, primarily recognizes part (a) of the list of care responsibilities in section 1 of the Act. It largely fails to address parts (b) to (j) because these responsibilities are almost never considered or included in damages awards for loss of support (par 21).

In further considering the list of care responsibilities in section 1 of the Act, Mohle J found it comprehensive on the aspect of caregiver guidance. He characterized it as quite broadly encompassing the “endless” list of what can

be entailed by parental guidance from the time of birth onwards (par 22). Examples of such guidance include teaching a child to eat and walk, to express appreciation and show respect, to do homework, and general guidance in life (par 22). Significantly, however, while parental care would usually also include showing love and affection towards a child, this is not expressly included in the section 1 list of care responsibilities. As a response to this omission, Mohle J held: “[i]t therefore seems to me that, for now, actions for damages arising out of s 28 of the Constitution will not be based on the child’s deprivation of parental love and affection” (par 23). He thus decided that an action cannot be based on the loss of love and affection of a parent wrongfully killed.

Nevertheless, the Court concluded that there is certainly sufficient legislative authority for the proposition that children’s rights to family care and parental care as described in section 1 of the Act to be protected and enforced (par 26). This still left the question of whether constitutional damages are “appropriate relief” for doing so. In deciding this point, the Court considered a contention of the defendants. The defendants had argued that the quantum of loss of support compensation agreed to between the parties already included the damages that the plaintiffs were referring to as constitutional damages. And furthermore, the agreed upon loss-of-support damages were sufficient in amount to include compensation for deprivation of parental care. The defendants alleged support for this submission from *Fose*. In that case Ackermann J had concluded that in other jurisdictions a distinction is drawn between private- and public-law damages, with constitutional damages being a type of public-law compensation, but that in South African law, the private law of delict could be developed and would be broad enough to provide relief for a breach of a constitutional right (*Fose* par 58). After careful consideration, Mohle J rejected this contention. He reasoned that Ackermann J’s *dictum* in *Fose* concerning delict was not applicable to the situation in *M*. The duty of a parent to maintain a child is no longer governed by common law, but by the Constitution and the Act. Compensation for loss of parental care is therefore not one of the areas where the common law can be sufficiently developed (par 43–44).

Mohle J finally concluded that, since the common law is not readily amenable to appropriate development, and in view also of the replacement of much of the common law with a new approach to parental care in section 28(1)(b) of the Constitution, and of the Act particularly in sections 1 and 15(1), constitutional damages are an appropriate remedy to compensate non-material/non-financial consequences of being deprived of a parent. The plaintiffs therefore had “a right to claim constitutional damages on behalf of their children, for unlawful deprivation of their father’s care as a result of the proven unlawful conduct of the members of the defendant” (par 54). However, as no relevant evidence had been put before the Court to enable it to calculate the appropriate amount of damages, the matter was referred for a separate trial in order to determine quantum (par 58).

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## 4 Discussion

The holding in *M* that constitutional damages can in principle be awarded to children as compensation for non-material harm resulting from unlawful deprivation of parental care is to be welcomed. Such harm is often significant, and may be even more serious in its long-term effects than loss of a parent's financial maintenance. *M* is therefore a valuable precedent which overcomes limitations of the common-law loss-of-support action. It opens the way for more complete compensation that better matches the full extent of harm typically suffered by a vulnerable group. In accordance with section 28(2) of the Constitution, it advances application of the best interests of children as a paramount consideration. Practitioners will no doubt also welcome some useful practical guidance which was provided on how to frame claims. Mohle J indicated that these must in the first instance allege a deprivation of a child's right to parental care as provided for in section 28(1)(b) of the Constitution. This must be supplemented by an averment that a cause of action for constitutional damages arises "in terms of s 15 of the Children's Act, as appropriate relief in the form of a claim for compensation arising out of loss of parental care" (par 53). Thirdly, it must be indicated specifically which of the parental-care components enumerated in section 1 of the Act a particular child has been deprived of by the loss of his or her parent (par 53).

However, although it commendably improves protection for children, there are two aspects of the *M* judgment which are problematic. First, it provides less than perfect guidance on what criteria should be applied in determining quantum of constitutional damages arising from loss of a parent. Mohle J admittedly did not ignore this entirely. He noted that in some Canadian and US jurisdictions the extent to which parental care would have impacted on future earnings of the child is treated as relevant (par 49). He mentioned sub-criteria for this approach applied in *De Centeno v Gulf Fleet Crews Inc* 798 F 2d 138 (5th Cir 1986). These were: the ages of the children at the time of bereavement, the nature of the relationship with the deceased parent, the role played by that parent in the child's development, time spent together and the general financial contribution by that parent in the upbringing of the child. Mohle J also pointed out that some US courts additionally consider whether there is still one surviving parent and the prospects of that parent remarrying (par 50). It would obviously have been helpful to the plaintiffs in *M* if Mohle J had concluded his comparative survey by expressly indicating that they could utilize these criteria as a basis for their quantum claim at the separate hearing which he required them to bring. Although approval of these criteria is possibly implied there is a difficulty with one of them, namely, the nature of the relationship with the deceased parent. As has been noted, on this aspect Mohle J held earlier in his judgment that "for now" the factor of a previously strong bond of love and affection between deceased parent and child *cannot* be used to increase damages. His reasoning was that this factor is not expressly enumerated in the list of parental responsibilities contained in section 1 of the Act. However, subsection 1(h) does include the criterion of "maintaining a sound relationship with the child". It is hard to see how any parent could possibly

fulfil this responsibility without developing a bond of love and affection. It is thus well arguable that provision of love and affection is impliedly included amongst the section 1 factors. If claimants are in future to be permitted to attach monetary value to such an amorphous concept as quality of parental guidance received by a child, there would seem no logical reason why this should not also be done with love and affection. With both of these, it will in most instances be possible to present evidence on the extent of the previous contribution of the deceased parent. In fairness, in his remark “for now” (par 23 as quoted above) Mohle J appeared to foresee a possible extension of claims to include this aspect in the future. However, the plaintiffs in the instant case are left uncertain about which of the US and Canadian criteria they are at liberty to apply to their quantum claim. It will be interesting to see how the Court handles the issue of quantum criteria when that claim is brought. For purposes of guidance of practitioners in future similar matters, it is to be hoped that the quantum judgment will be reported.

Aside from less than clear guidance on the essential aspect of quantum criteria, there is a second difficulty with the *M* judgment. Towards the end, Mohle J stated “[h]owever, in my view, the child cannot claim for both loss of support and deprivation of parental care separately, as the former is part of the latter. Such claim would amount to duplication and undue enrichment” (par 51). This, with respect, should have been clarified with some further procedural explication. As it stands, it diminishes the value of *M* as a pioneering precedent since it sows seeds of confusion for future litigants. That the “former is part of the latter” was precisely the argument of the defendants which Mohle J himself had rejected! It is clear that the claimants in *M* were bringing a separate claim for loss of parental care, *after* prior settlement of their claim for loss of support. Mohle J not only allowed them to do so, but directed an additional special hearing for the aspect of quantum of damages for loss of parental care. This is contradictory to his dictum about not separating claims. There is thus an unfortunate disjuncture between what the court said, and what it actually did. Again, the result is less than clear guidance for future litigants.

It is perhaps understandable that in treading on such new terrain Mohle J left the plaintiffs and future litigants somewhat in the dark on some (unfortunately, rather important) aspects. As we have suggested, he has nevertheless made a creative and important contribution in opening the way for constitutional damages for non-material consequences of loss of parental care. Although claims for constitutional damages have so far only been brought against the State, the reasoning in *M* could easily be extended to allow future claims against private individuals who unlawfully deprive children of parental care. This, in turn, could open new possibilities for constitutional damages generally.

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