

8 The psychological effects of Covid-19 and lockdown on parental alienation

Emotional harm as a remedy for an alienated parent?

Franaaz Khan* 

*Faculty of Law,
University of Johannesburg*

Abstract

The COVID-19 lockdown has severed many families, where they found themselves having a limited period to decide who would live where and with whom. In other instances, it cemented the divide which already existed for the non-custodial parent. Parents found themselves in a tug-of-war over the children and with courts being temporarily closed during this time, travel restrictions and lockdown regulations, it became harder to enforce custody agreements. This worked out somewhat perfectly for the parent who tried to alienate their children from the other parent. Parental alienation is a recurring problem that affects many families who are experiencing high conflict, separation and divorce. Parental alienation can be defined as a process whereby one parent undermines the child's previously intact relationship with the other parent. It creates a situation where the alienating parent teaches the child to reject the other parent, to fear the parent and to avoid having contact with that parent. Although not much has been done to officially recognise parental alienation in South African courts, the law advocates for the best interests of the child in terms of the Children's Act 38 of 2005.

Although parental alienation has been described in the psychiatric literature for at least 60 years, it has never been considered for the

* LLB, LLM, PhD (UKZN). Senior Lecturer: Department of Private Law at the University of Johannesburg.

inclusion in the Diagnostic and Statistical Manual of Mental Disorders (DSM). Nonetheless there have been various proposals and opinions that parental alienation be included in the definition. In addition, parental alienation does have emotional consequences to an alienated parent. When an alienator parent's conduct leads a child to reject the other parent, the alienated parent's emotional response usually includes a "sense of powerlessness and frustration", stress, loss, grief, anger, fear and feelings of pain, anxiety, deficiency, humiliation and being unloved. Ultimately, the alienated parent experiences the anguish of the loss of a child, which in turn causes that parent immense mental pain and suffering. This is similar to loss and is combined with the continuing concern for the child.

The long-time existence of parental alienation and its lack of appropriate legislative consequences is a cause for concern. Unless effective deterrents to parental alienation are implemented, it is a fair prediction that alienation will continue. This paper will focus and discuss the civil remedies that are available for an affected parent. The paper will further propose that the additional delictual remedy for emotional distress and harm be utilised by an alienated parent against the alienator if their case warrants it.

1 Introduction

When parents part ways, children are often the victims being caught up in their parents' bitterness. While some parents can agree upon their child's living arrangements, there is a minority where the levels of animosity are such that children end up suffering emotional harm. The single most important factor that prevents a healthy environment between parents is communication. The extreme case results in one parent either deliberately or unwittingly turns the child against the other parent. This phenomenon is known as parental alienation. Unless steps are taken by the alienated parents, with the support of professionals and the courts, parental alienation will continue to damage the lives of children. One of the unfortunate impacts of the COVID-19 pandemic is the increase we have seen in cases where one parent uses lockdown or self-isolation measures as an excuse to stop the other parent from seeing their child. Claims that a family need to self-isolate is difficult to prove and with our courts under increasing pressure, the time it currently takes for matters to reach court can mean damage as issues cannot be addressed as swiftly. In addition, the psychological damage that is experienced by the alienated parent is a cause for concern. The question that follows is whether in addition to

the delictual claim for defamation, there is further remedial assistance that is available to the alienated parent who is the victim of such psychological and emotional abuse? This chapter will examine and discuss the accessory remedy of emotional harm in delict that can also be utilised by the alienated parent if their case warrants it.

The chapter firstly considers the distinction between parental alienation and parental alienation syndrome. In addition, the effects of COVID-19 on parental alienation are highlighted in this paper. Moreover, the paper examines the psychological implications of parental alienation on the alienated parent and the current legislative framework in South Africa pertaining to parental alienation. The paper further discusses the civil remedies available to an alienated parent in South Africa and draws on the similarities and differences with the United States. The paper concludes by advancing that alienated parents should explore the additional delictual claim of emotional harm in South Africa.

2 Definition of parental alienation v parental alienation syndrome

2.1 Parental alienation (PA)

Richard Gardner first coined the term parental alienation in early 1980 in response to a cluster of symptoms.¹ Parental alienation refers to an attempt by one parent to alienate the child or children from the other parent usually within the context of divorce and or separation². This includes denigrating, criticising and attacking the other parent in front of the children and with the children. The parent's aim is to remove the target parent from the child's life and make it seem as if that is the way the child feels.³

2.2 Parental alienation syndrome (PAS)

Parental alienation syndrome is a somewhat controversial term which refers to the psychological condition that exists within the child who has been a victim of parental alienation behaviour. PAS is the effect of one parent's manipulation so that the child changes his or her view

1 Viljoen "Unintentional state enforced parental alienation syndrome during the hard lockdown in South Africa" 2021 *The Family Journal: Counselling and Therapy for couples and Families* 1.

2 Viljoen (n 1) 2.

3 Viljoen (n 1) 2.

of the other parent from being a person of love into a person of hate.⁴ This is a very damaging psychological illness which can and often will create lifelong harm to the child. According to Childress, children can become so indoctrinated and eager to please the powerful parent that they themselves might start hating or abusing the targeted parent.⁵ PAS does not appear in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) which lists mental health conditions recognised by the American Psychiatric Association.⁶ Neither is it recognised as a mental health condition by the World Health Organization (WHO). Although the WHO officially updated their 11th International Classification of Diseases (ICD-11) on 25 May 2019 to include PAS,⁷ it was removed again on 20 September 2020. The reason according to WHO is because it is a “judicial term and issue and its inclusion for coding purposes in the ICD-11 will not contribute to valid or meaningful health statistics”. However, the DSM-5 has a code for a “child affected by parental relationship distress” which could include PAS.⁸

3 The effects of COVID-19 and parental alienation in South Africa

South Africa, while being delayed in terms of the contraction of the disease when contrasted with the rest of the world, was no exception to this global pandemic. In response to the rising number of confirmed cases in South Africa, a “hard” or full lockdown was announced on 23 March 2020 by President Ramaphosa. Strict rules and regulations were issued by the government for the general public. One of the regulations prohibited the movement of children between divorced parents, separated parents, co-holders of parental rights or responsibilities during lockdown. However, during April 2020, amendments were made to this regulation resulting in their relaxation. The resultant is that the movement of children between parents and/or co-holders of parental rights and responsibilities remained prohibited. There were two exceptions, where an existing court order was in existence

4 Bernet, “Parental alienation, DSM-V, and ICD-11” 2010 *The American Journal of Family Therapy* 76.

5 Bernet (n 4) 77; “Parental alienation has officially been recognized by WHO, but it’s been a violation of od SA children’s rights sine 2005” at https://www.news24.com/parent/Family/Relationships/Finance_Legal/parental-alienation-has-officially-been-recognised-by-who-but-its-been-a-violation-of-sa-childrens-rights-since-2005 (16-11-2021).

6 Bernet (n 4) 103.

7 Viljoen (n 1) 2.

8 Viljoen (n 1) 3.

or if there was a parental right or responsibility agreement or plan which regulated contact arrangements in place.⁹ These regulations placed the onus on those transporting these children to have in their possession the necessary court order or agreement. What can result in complication to this is that these provisions are subject to the condition that there is no person known to have come in contact with an individual who has contracted COVID-19 in either home to which the child is expected to travel to or from.¹⁰ The COVID-19 lockdown has severed many families and cemented the divide which already existed for the non-custodial parent. This worked out somewhat perfectly for the parent who tried to alienate their children from the other parent. Parental alienation is a recurring problem that affects many families who are experiencing high conflict, separation and divorce.¹¹

4 Psychological effects of parental alienation

Parental alienation causes behavioural, emotional, or psychological harm.¹² It can be a form of psychological violence and abuse that occurs in the family context, where the child is used as an instrument or agent by one parent against the other. PA has been viewed as one of the most serious types of “emotional abuse” and a species of psychological violence.¹³ Several techniques are utilised in parental alienation. They include false allegations of child abuse, false statements relating to the targeted parent or devaluation of such parent through criticism of lifestyle or character, distorting history or limiting conversations or visits with the child.¹⁴ The impairment in the parental relationship can lead to significant psychological consequences for an individual. Both the child and the targeted parent who is subject to the loss of a child, which can cause extreme mental anguish, are arguably the victims of psychological violence.¹⁵

9 Viljoen (n 1) 2; “South Africa: Lockdown: What does it mean for divorced and separated parents’ contact rights in respect of their children” at <http://www.mondaq.com/south-africa/divorce/925790/lockdown-what-does-it-mean-for-divorced-and-separated-parents-s39-contact-rights-in-respect-of-their-children> (18-11-2021).

10 Viljoen (n 1) 3.

11 Viljoen (n 1) 3.

12 Van der Bijl “Investigating parental alienation as a form of domestic violence, child abuse and harassment: A legal hypothesis” 2016 *Obiter* 121.

13 Van der Bijl (n 12) 123; *Hendrickson v Hendrickson* 2000 ND 1 603 N.W.2d 896 903.

14 Van der Bijl (n 12) 123.

15 Van der Bijl (n 12) 123.

When an alienator parent's conduct leads to a child to reject the other parent, the alienated parent's emotional response usually includes a "sense of powerlessness and frustration", stress, loss, grief, anger and fear and feelings of pain, anxiety, deficiency, humiliation and being unloved.¹⁶ Additionally these feelings of pain and suffering are sometimes exacerbated by some outsiders, who at least partially blame the alienated parent for the child's rejection by pointing to the alienated parent's flaws.¹⁷ The intense emotions suffered by the alienated parent can cause him or her to lash out at even the child. Ultimately the alienated parent experiences the anguish of the loss of a child, which in turn causes that parent immense mental pain and suffering. This is similar to the loss of a child to death, but in some ways, it can seem worse to the alienated parent because the alienated parent wants to restore their relationship with their children and will try anything to end the impasse. Eventually some alienated parents give up on the parent-child relationship.

5 Current legislative frameworks regarding parental alienation in South Africa

5.1 Legislative frameworks

5.1.1 Constitution of the Republic of South Africa¹⁸

The inclusion in the Bill of Rights of a special section on the rights of the child was an important development for South African children. Children need special protection because they are among the most vulnerable members of society. They are dependent on others, their parents and families, or the state when these fail, for care and protection. Children's rights are a priority, and the best interests of a child are the overriding concern when it comes to any matter affecting them.¹⁹ Section 28 of the Constitution protects the interest of a child, and this includes protection from harm or abuse. The interpretation of this provision will most certainly include abuse from parental alienation.

16 Varnado "Inappropriate parental influence: A new app for tort law and upgraded relief for alienated parents" 2011 *DePaul Law Review* 113.

17 Varnado (n 16) 126.

18 Constitution of the Republic of South Africa, 1996.

19 "Children's rights: Why protect children's rights?" at [http: www.concourt.org.za](http://www.concourt.org.za) (22-11-2021).

5.1.2 The Children's Act²⁰

Section 9 of the Children's Act specifically singles out and ensures that a child's best interest is of paramount importance. Section 7(1) of the act should be read together with section 28(2) of the Constitution. After the Children's Act was enacted, a list of factors was provided in s 7(1) that need to be considered in the determination of the best interests of a child. These factors include the nature of the relationship between the parent and child,²¹ the attitude and capacity of the parents,²² the emotional and physical security of the child,²³ the need to be raised in a stable family or caring environment,²⁴ and the need to be protected from any psychological or physical harm that could be caused by abuse, neglect, exploitation or exposing such child to exploitative harmful or violent behaviour.²⁵ Our courts have reiterated that children need to be protected from abuse, neglect, maltreatment or degradation as seen in the case of *G v G*.²⁶ Courts have also looked at which parent is better able to promote and ensure the child's physical, moral, emotional and psychological welfare as noted in the case of *Soller NO v G and Another*.²⁷ In the constitutional court decision of *S v M*, it was held that where a breakup in a family is certain to occur, the state should minimise the negative effect on children as far as possible and the best effort possible should be made to avoid the destruction of family life.²⁸

5.1.3 The Domestic Violence Act 116 of 1998

In terms of the Domestic Violence Act, domestic violence can take on many different forms. In terms of section 1, the harm that is defined as domestic violence includes forms of abuse such as psychological or emotional, harassment, intimidation and stalking.²⁹ Further in terms of section 1 emotional, verbal, and psychological abuse refers to a pattern of degrading or humiliating conduct. In addition, the act recognises that the respondent can be a person who is, or was, in a domestic relationship with the complainant.³⁰ Section 7 allows for a

20 Children's Act 38 of 2005

21 s 7(1)(a) of the Children's Act; Van der Bijl (n 12) 128.

22 s 7(1)(b) and (c) of the Children's Act; Van der Bijl (n 12) 129.

23 s 7(1)(g) of the Children's Act.

24 s 7(1)(k) of the Children's Act.

25 s 7(1)(l) and (i) of the Children's Act.

26 *G v G* 2003 5 SA 396 (ZH) 400.

27 *Soller NO v G and Another* 2003 5 SA 430 (W) 54-55.

28 *S v M* 2008 3 SA 232 (CC), 2007 2 SACR 539 (CC) 20; Boezaart *Child Law in South Africa* (2009) 281-284 and Van der Bijl (n 12) 129.

29 Van der Bijl (n 12) 129.

30 Van der Bijl (n 12) 130; s 7 of the Domestic Violence Act 116 of 1998.

protection order to be issued to prohibit the commission of any act constituting domestic violence or enlisting the help of another person to commit any such act. Despite the act focussing on violence against women and children, the definition in respect of the complainant is not restricted to such persons and would include male victims of domestic violence as well. The act also views a domestic relationship where parties are divorced and are parents of a child.³¹ Therefore, a former spouse who is the alienated parent will be included in terms of this act. However, a crossroad may present itself with the issuing of a protection order in a situation where a child may be in the sole custody of the parent who is enlisting the child's aid in perpetrating the harm.³² Sometimes a protection order may aggravate visitation rights should such an order be issued.³³ Nonetheless, penalties in the form of a fine or imprisonment occur for contravention relating to protection orders.³⁴

5.1.4 Protection from Harassment Act 17 of 2011

As one is aware, the above act regulated harassment in South Africa. Section 1 of the act defines harassment as directly or indirectly engaging in conduct that the respondent knows or ought to know (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant. Harm is broadly defined and includes "any mental, psychological, physical or economic harm" caused.³⁵ In addition, the act also covers instances where the alienating parent sends harassing emails or harasses verbally.³⁶ Sections 2, 11(a) and 11(b) allows for a protection order and a suspended warrant of arrest to be issued, in addition to a fine and imprisonment being imposed if the alleged perpetrator is found to have contravened any section of the act.³⁷

It is applauded that there are different forms of criminal relief available as discussed above in respect of the Domestic Violence Act and the Protection from Harassment Act to an alienated parent. This relief includes an alienated parent seeking a protection order against the alienator to the alienator being convicted of an offence. Unfortunately, the criminal law remedies cannot provide a system of compensation for an alienated parent who has been wrongfully harmed by the intentional or culpable conduct of the alienator. The

31 s 1 of the Domestic Violence Act.

32 Van der Bijl (n 12) 130.

33 Van der Bijl (n 12) 130.

34 s 7 and 12 of the Domestic Violence Act.

35 s 1(b) of the Protection from Harassment Act.

36 s 4 of the Protection from Harassment Act.

37 s 11(a) and (b) of the Protection from Harassment Act.

law of delict offers this relief, and it is also the voice of society's views on what it considers acceptable behaviour and what it does not. At the heart of the delictual principles lie society's legal convictions, or *boni mores*, which include legal and public policy considerations as well as constitutional rights and norms.³⁸

Parental alienation is becoming increasingly popular and with the sensitive times such as COVID-19, public policy considerations will reasonably expect that a victim be provided with additional forms of civil remedies if their case warrants such relief. The current civil remedy available to an alienated parent is discussed below with focus thereafter turning to emotional harm as an additional remedy that should also be considered by the alienated parent.

5.2 Civil remedy

5.2.1 Defamation

The law of defamation is mainly concerned with protecting the *fama* (the good name or reputation) of both natural and juristic persons. In the case of *O'Keeffe v Argus Printing and Publishing Co Ltd*: "(a) person's reputation is ... that character for moral or social worth to which he is entitled amongst his fellow-men".³⁹

A person's reputation refers to the good name the person enjoys in the estimation of others, that is, what others think of that individual as a person.⁴⁰ The constitution protects reputation via the right to dignity, and courts have indicated that the right to dignity includes the right to reputation.⁴¹ The law of defamation seeks to protect a person's right to an unimpaired reputation or good name against any unjust attack. In doing so, the right to reputation is often pitted against the right to freedom of speech and expression.⁴² A victim would have to prove that the defamation was (i) wrongful and (ii) intentional and (iii) publication of (iv) defamatory material that (v) refers to the plaintiff.⁴³

Although the civil remedy for defamation is available for some victims alienated parents, it can be onerous to prove at times. In addition to proving all the elements of delict, the plaintiff must prove the additional requirement of publication as discussed above.

38 Jabavu *The Law of Delict in South Africa* (2013) 3.

39 *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244(C) 247-248.

40 Jabavu (n 38) 410.

41 Jabavu (n 38) 411.

42 Jabavu (n 38) 422.

43 Jabavu (n 38) 423.

Publication demonstrates that the defamatory statement has reached someone other than the person to whom it refers.⁴⁴ Reputation involves what others think of someone, a person's right to reputation is factually interfered with only when another person communicates defamatory material referring to that person and makes it known to at least one other person.⁴⁵ The requirement of publication which is a required conduct element in defamation is vital. If nothing has been published, the plaintiff will not succeed in such a claim.⁴⁶ The majority of parental alienation cases take place in a private dwelling set up and often the attack is only between the alienator and the victim. In these circumstances it will be impossible for a victim to successfully institute a defamation claim where no publication has occurred. However, it is not the end of the road for a victim. It is common cause and accepted that delict in South Africa is generic and allows for victims to claim for various forms of damages. In the circumstances, this paper seeks to advance the idea that a delictual claim for emotional harm should be explored by an alienated parent as an additional remedy.

In comparison, in the United States, victims are afforded a civil relief known as intentional infliction of emotional distress (IIED) similar to South Africa's delictual claim for emotional harm and shock. However, in the United States, there is increasing support to include parental alienation claims under IIED as well. Such a remedy can be instituted if a case warrants it. This form of relief offered in the United States is examined below in more detail.

6 Parental alienation in the United States of America and tort law

In the United States, a tort in common law jurisdiction is a civil wrong that causes a claimant to suffer loss or harm resulting in legal liability for the person who commits the act.⁴⁷ Tort law is favoured as an alternative field of law for consideration of the issue of parental alienation. Authors have advocated that courts should recognise a cause of action for the intentional alienation of a child as a form of tort (delictual action), not only for compensation for the victim parent, but also as a form of deterrent against behaviours that

44 Jabavu (n 38) 423.

45 Jabavu (n 38) 423.

46 Jabavu (n 38) 424.

47 García "Intentional infliction of emotional distress torts as the best option for victims when cyberbullying conduct falls through the cracks of the U.S. criminal law system" 2016 *Revista Juridica* 85.

denigrate the other parent, and also to disincentivise the other parent from causing harm.⁴⁸ A tort (delict) is committed where a defendant intentionally interferes with the plaintiff's rights where the plaintiff has a custody order for custody or visitation rights, which action includes situations where there is the wilful disobedience of a court order, violent abduction or wrongful detention.⁴⁹ Scholars such as Hatch have further demonstrated that where there is a "pattern of behaviour" that would ultimately undermine the relationship between the father and the children that interferes with the father's parental rights and constitutes serious emotional abuse, it amounts to tortious interference of custody rights.⁵⁰ Courts in the US have also recognised a "rubric of harms" under tort law, which include emotional harm, anxiety, diminished enjoyment or loss of tranquillity or autonomy.⁵¹ A stand-alone emotional distress claim entails that emotional harm is inflicted intentionally without the need to assert the physical harm that was also inflicted.⁵² For the plaintiff to succeed in an IIED claim, they must establish *prima facie* four elements:

- a. that the defendant intended to inflict emotional distress or knew or should have known that emotional distress was a likely result of their action;
- b. that the conduct was extreme and outrageous;
- c. that the defendant's conduct was the cause of the plaintiff's distress;
- d. that the emotional distress sustained by the plaintiff was severe.

Currently all states and territories in the United States recognise IIED as a civil cause of action in one way or another.

Similarly in South Africa, an alienated parent can in his/her personal capacity institute a claim for emotional harm and shock under the action of *actio iniuriarum* against the alienating parent. The definition of emotional shock and harm can include various meanings as discussed below. To date, in South Africa, no claim for emotional harm and shock based on parental alienation has been instituted. It is submitted that victims should explore this additional remedy offered if their case warrants it. The emotional harm and shock remedy in South Africa is further discussed below.

48 Van der Bijl (n 12) 126.

49 Van der Bijl (n 12) 126.

50 Van der Bijl (n 12) 126.

51 Van der Bijl (n 12) 127.

52 Van der Bijl (n 12) 127.

7 Emotional harm and shock in South Africa

An example of an instance where a person could suffer “emotional shock” would be as a result of a motor vehicle accident.⁵³ The person suffering from the “emotional shock” could either have been directly involved in an accident or a witness to the accident or heard of the consequences of the accident afterwards.⁵⁴ The causing of actual emotional shock is treated in practice as a specific form of delict which may result in patrimonial loss. For non-patrimonial loss suffered due to the infringement of the personality right to physical-mental integrity, so called general damages maybe claimed with the action for pain and suffering or *actio inuiuriarum*.⁵⁵ An injury to the brain or nervous system that results from nervous or emotional shock is also a form of physical or bodily injury, because the nervous system is as much a part of the body as bones and muscles.⁵⁶ The landmark decision pertaining to emotional shock was the case of *Bester v Commerical Union*⁵⁷ where the court had to decide the nature of emotional shock because the plaintiffs claim was based on legislation that provided for an award of damages for “bodily injury” caused by, or results from driving a motor vehicle. Since the decision in the *Bester* case, terminology relating to emotional shock has developed and expanded to include: “shock”, “nervous shock”, “psychological lesion”, “psychological trauma”, “psychological disorder” and “psychiatric injury”.⁵⁸ In the recent decision of *Swartbooi v RAF*⁵⁹, emotional shock was described as⁶⁰ “(s)hock suffered by a person without necessarily personally sustaining bodily injury. This kind of shock is caused when a third party observes or is mortified by an unpleasant or disturbing event, for example, the killing of a relative or a person with whom the third party had a close relationship.”

53 Ahmed and Steynberg “Claims for ‘Emotional Shock’ Suffered by Primary and Secondary Victims” 2015 *THRHR* 181.

54 Ahmed and Steynberg (n 53) 181.

55 Ahmed and Steynberg (n 53) 182.

56 Ahmed and Steynberg (n 53) 183.

57 *Bester v Commerical Union* [1972] ZAENGTR (20 Nov 1972) 1.

58 Ahmed and Steynberg (n 53) 183.

59 *Swartbooi v RAF* 2012 3 All SA 670 (WCC); 2013 1 SA 30 (WCC).

60 the *RAF* case 34F-G.

7.1 Requirements in respect of a claim for causing emotional shock in South Africa

If the causing of emotional shock should result in a successful delictual claim, all five elements of delict must generally be present, namely conduct, wrongfulness, fault, causation, and harm or loss.

7.1.1 Conduct

The conduct (in the form of an omission or commission) of the wrongdoer would typically lead to the death or injury of the primary victim, which could also result in the primary victim suffering emotional shock.⁶¹

7.1.2 Wrongfulness

The conduct must cause harm or prejudice in a legally reprehensible or unreasonable manner to be regarded as wrongful. When someone suffers emotional shock, the wrongfulness would typically lie in the infringement of the plaintiff's right to his or her physical-mental integrity.⁶² The infringement could result in either physical or non-physical injuries (mental or psychological).

7.1.3 Fault

Fault in the form of either negligence or intention is usually required to succeed with a claim for the causing of emotional shock.⁶³ In respect of negligence, what must be established is whether the reasonable person in the position of the wrongdoer would have foreseen the reasonable possibility of the conduct causing the emotional shock and would have taken reasonable steps to prevent such harm from occurring, if such wrongdoers failed to take those reasonably preventative steps, his/her conduct is regarded as negligent.⁶⁴ If the psychological harm was caused intentionally, one could also bring an action under the *actio iniuriarum*. Intentional infliction of emotional shock is an *iniuria* actionable under the *actio iniuriarum*. In *Waring and Gillow Ltd v Sheborne*,⁶⁵ the court acknowledged intentional emotional shock and stated: "(i)t would be different, under certain circumstances, in an *actio iniuriarum* based upon a wilful attack upon or violation of the feelings of another. In such a case, it might be possible to award compensation for the outrage of the feelings or the insult to the honour". The principles of the *actio*

61 Ahmed and Steynberg (n 53) 190.

62 Ahmed and Steynberg (n 53) 190.

63 Ahmed and Steynberg (n 53) 191.

64 Ahmed and Steynberg (n 53) 191.

65 *Waring and Gillow Ltd v Sheborne* 1904 (TS) 340- 348.

iniuriarum are broad enough to accommodate cases of intentional infliction of emotional shock as well.

7.1.4 Causation

In *Barnard v Santam Bpk*⁶⁶ it was stated that not only must it be proven that the conduct of the wrongdoer was negligent but also that the negligent conduct of the wrongdoer was the legal cause of the harm suffered. Factual and legal causation must be proved. Factual causation must obviously be present, and the question of legal causation is to determine whether the harm or loss suffered is not too remote to be recognised in law.⁶⁷ The test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence, or presence of a *novus actus interveniens*, legal policy, reasonableness, fairness and justice all play their part.⁶⁸ In determining legal causation in the case of emotional shock, the flexible approach is applied. In terms of this approach, there is no single criterion for legal causation but what must be determined is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.⁶⁹

8 Recommendation and conclusion

The paper examined the effects of COVID-19 on parental alienation in South Africa and the exacerbated psychological effects that resulted because of the alienators conduct on the alienated parent. With the current pandemic and the uncertainty of future lockdowns being imposed, there will be a further rise in psychological harm suffered by an alienated parent. Moreover, this paper sought to highlight and discuss the legislative framework in South Africa and the protection that is afforded to an alienated parent. The criminal law remedies available provide ventilation for such parents. However, the paper discussed that criminal law remedies cannot offer a victim compensation for the harm that they have suffered as a result of the intentional conduct of the alienator. The paper examined our international counterpart, the United States and the civil remedy under tort law offered to an alienated parent. In respect of the current civil remedy available in South Africa to an alienated parent i.e.: a claim for defamation under

66 *Barnard v Santam Bpk* 1999 1 SA 202 (SCA); 1998 4 All SA 403 (A) D-E.

67 Ahmed and Steynberg (n 53) 194.

68 Ahmed and Steynberg (n 53) 195.

69 Ahmed and Steynberg (n 53) 195.

the *actio iniuriarum*, one noted that in certain instances, the element of publication which is one of the requirements for such a claim, will prove onerous in circumstances when the harm occurs in a private platform between the alienator and the alienated parent. In addition, the paper examined and discussed the current remedy of emotional shock and harm that is available in South Africa and has proposed that an alienated parent should consider exploring this additional remedy under the *actio iniuriarum* as well. Undeniably, the alienated parent would have to successfully prove all delictual elements on a balance of probabilities. However, the fault element in respect of such a claim is broad enough to accommodate cases in which the conduct is either intentional or negligent. This is encouraging and provides the victim a better chance of success as compared to United States where the fault requirement is strictly that of intention in respect of the IIED claim. It is accepted that with a claim for emotional shock and harm where there is only psychological harm suffered, there is no closed list of cases and courts can impose liability for any conduct that either intentionally or negligently causes psychological harm. It is proposed further that our courts should be amenable to listen to cases of this nature where the alienated parent suffers only psychological harm. The alienated parent who suffers from such harm must prove a detectable and recognised psychiatric injury or lesion that is not passing or trivial. This additional recourse will assist a victim in providing him with the necessary psychological assistance that he requires and more so provide him with the comfort that his aggressor would not be let off easily. This will also serve as a deterrent to future alienators of such offences.

