RAILROAD OPERATOR'S FAILURE TO PROTECT PASSENGER AGAINST ATTACK ON TRAIN NOT NEGLIGENT

Shabalala v Metrorail 2008 3 SA 142 (SCA)

1 Introduction

This judgment concerns the appeal against a judgment of the Johannesburg High Court (*Shabalala v Metrorail* 2007 3 SA 167 (W)) in which the plaintiff failed in his claim for damages against the defendant. In a case note dealing with the latter judgment ("Failure by passenger to hold railroad operator liable for damage occasioned by robbery on train – *Shabalala v Metrorail* 2007 3 SA 167 (W)" 2008 *THRHR* 323 330), I commented favourably on the judgment of Horn J, noting in particular that he had applied the "elementological" method of establishing delictual liability correctly in coming to the conclusion that the defendant should not be held liable. It is thus with some measure of satisfaction that the

present author read the judgment of the Supreme Court of Appeal in this matter, seeing that the court of appeal did not overturn the judgment of the trial court in the plaintiff's (appellant's; hereafter reference will exclusively be made to the plaintiff as "appellant" and the defendant as "respondent") favour. However, on rereading the appeal judgment, it becomes evident that the reasons advanced by Scott JA for that court's decision differ in some measure from those proffered by Horn J in the court *a quo*. The question which now arises for decision is whether the differences referred to are of a minor nature, or whether they possess a significance beyond the immediate effect of the judgment on the parties concerned.

2 Facts and judgment

The appellant who had been travelling as a passenger on a train operated by the respondent was shot and seriously injured during a robbery by unknown assailants. This incident occurred on a day when no security personnel were deployed by the defendant at the entrances to the railway platforms in order to ensure that only legitimate ticket-holders boarded trains, nor in the train coach which the appellant had entered, to protect commuters during their journey. The evidence did not show whether the robbers had already been present in the coach beforehand, or whether they had entered it as part of a group of commuters who had approached the train through the unattended station entrance. What emerged in fact was that the appellant had experienced the incident as a complete surprise, as there had been no previous indications of the impending attack: the group of passengers who had boarded the train in the plaintiff's company all gave the appearance of being normal commuters and there had been nothing suspicious about the appearance of the three robbers involved (143F–144D).

In view of the fact that the identities of the appellant's assailants had never been established and that, even if it had been, it would probably have been an exercise in futility to institute civil proceedings against the robbers themselves (see Scott 2008 *THRHR* 323, referring to Neethling, Potgieter and Visser *Law of delict* (2006) 268), the appellant instituted a delictual claim against the respondent on the basis of the latter's causing pure economic loss to the former by its negligent failure to exercise its alleged duty towards taking adequate steps to protect the appellant, in his capacity as a commuter, against criminal attacks on its premises and trains. The main thrust of the appellant's claim rested on the averment of negligence on the respondent's part. The character of the negligent conduct relied upon is accurately described by Scott JA as follows:

> "It will be observed, in passing, that the grounds of negligence relied upon are all of a general nature and relate to a systemic failure on the part of the respondent. In other words the alleged failure did not relate to an omission on the part of an individual employee to act in a particular way in relation to the specific incident in question, but rather to an omission of a general nature on the part of the respondent to put in place measures that would ensure the safety of commuters travelling on the respondent's trains [144H–I] . . . In the court *a quo* Horn J dismissed the appellant's claim. Assuming for argument's sake that the respondent's omission had been wrongful (170B of the trial court's judgment), the court based its judgment on the simple reason that the respondent failed to establish a factual causal nexus between the appellant's loss and the respondent's wrongful conduct (170C–E of the trial court's judgment). On grounds of pure logic this failure made a proper assessment of the delictual element of negligence unnecessary and, in fact, impossible, if one keeps in mind that our case law overwhelmingly adheres to the so-called concrete (or relative) approach to the foreseeability stage of the two-tier

> negligence test (viz foreseeability and preventability: for which see the classical formulation in *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F; further Neethling, Potgieter and Visser 126–129; cf Van der Walt and Midgley *Principles of delict* (2005) 169) of the *diligens paterfamilias*. Horn J went even further than pure logic demanded and, from abundant caution held that, *even if the respondent's conduct would have been proved to be negligent* (170B of the trial court's judgment), the absence of the factual causation element on the latter's part would still be fatal to the appellant's successfully claiming damages (see Scott 2008 *THRHR* 330)."

Scott JA who delivered the judgment of a unanimous court (Heher, Jafta, Maya and Combrinck JJA concurring) based his rejection of the appeal on the sole absence of proof of negligence on the respondent's part. However, the order of the court *a quo* was altered from one dismissing the claim, to one of granting absolution from the instance (147B).

3 Critical evaluation

3 1 Introduction

At first glance the judgment of the Supreme Court of Appeal would appear unremarkable: for all practical purposes the *status quo* of the parties as established by the trial court judgment is upheld. However, on closer scrutiny the judgment causes the eyebrows to be raised: the basis of the decision of the court *a quo*, that is, the absence of factual causation, was never even mentioned, far less decided upon. This leaves one with the uneasy question: what was the reasoning behind the court's decision to amend the original order, dismissing the claim, to one of absolution from the instance? For, even assuming that the appellant could now adduce evidence that would enable a court to make a finding of negligence on the respondent's part (which finding would *ex necessitate* have to be based on the less applied abstract approach to the foreseeability stage of the negligence test, in which the question is asked whether the reasonable person in the wrongdoer's shoes would have foreseen *harm in general*: Neethling, Potgieter and Visser 126), how would the trial court be able to come to another conclusion in respect of the appellant's non-liability in view of it having already been decided that factual causation as delictual element of the respondent's conduct had been lacking?

3 2 The court's approach to the application of general principles of wrongfulness and negligence

This judgment will undoubtedly be unpopular with the majority of South African legal scholars, textbook authors and commentators, namely those who associate themselves with the so-called "standard" academic approach (for this label, see Fagan "Rethinking wrongfulness in the law of delict" 2005 *SALJ* 90) to the definition of the concept of delict and the isolated delictual "elements" of human conduct, wrongfulness, fault, causation and damage (see Scott 2008 *THRHR* 327 for references to academic sources). One need go no further than the first three sentences of Scott JA's *ratio decidendi* to realise why this observation is made:

> "It is now well established that a negligent omission, unless wrongful, will not give rise to delictual liability. The failure to take reasonable steps to prevent foreseeable harm to another will result in liability only if the failure is wrongful. It is the reasonableness or otherwise of imposing liability for such a negligent failure that will determine whether it is to be regarded as wrongful" (144J).

This statement of the law is made with reference to the recent judgment of the same court in *Trustees, Two Oceans Aquarium Trust v Kantley & Templer (Pty)*

Ltd 2006 3 SA 138 (SCA) 144E–F, which judgment has attracted strong criticism from a theoretical point of view (in particular from Neethling and Potgieter "Wrongfulness and negligence in the law of delict: A Babylonian confusion?" 2007 *THRHR* 121 122ff; see also Neethling "Aanspreeklikheid van getuies in hofverhore – *Black v Joffe* 2007 3 SA 171 (K)" 2008 *THRHR* 316 321). It also highlights the emerging approach of more recent times of the Supreme Court of Appeal to the treatment of the delictual elements of wrongfulness and negligence and, in particular, the relationship of these two elements to one another, which approach is championed from the academic side, mainly by Fagan who goes about it with vigour (2005 *SALJ* 90). It is not my intention to intimate that this respected academic stands in splendid "academic" isolation on this issue. His point of view and substantive arguments are in conformity with those of Brand JA as reflected in the *Two Oceans Aquarium Trust* case, which judge of appeal (and former full-time academic at the University of Stellenbosch) holds these views also in his "academic" capacity as a professor extraordinary in private law in the Faculty of Law at the University of the Free State, as reflected in his inaugural lecture in that capacity ("Die jongste ontwikkelings in deliktuele aanspreeklikheid vir lates en vir suiwer ekonomiese verlies" delivered on 8 March 2006, published under the title "Reflections on wrongfulness in the law of delict" 2007 *SALJ* 74; see also Fagan "Blind faith: A response to Professors Neethling and Potgieter 2007 *SALJ* 285 291). Daniel Visser's view (Du Bois (ed) *Wille's Principles of South African law* (2008) 1096–1102 1123–1129) would also seem to incline to that of Fagan.

The theoretical utterances of our Supreme Court of Appeal in this regard directly conflicts with the theory in respect of wrongfulness and negligence expounded in all the major South African textbooks, in particular with regard to the tests to establish whether wrongfulness and negligence are present in the defendant's damage-causing conduct: the *communis opinio* emerging from the text books is that the reasonableness test for wrongfulness (the *boni mores* test) falls logically to be conducted in *ex post facto* fashion (diagnostically), anterior to the application of the *diligens paterfamilias* test for negligence which is applied *ex ante facto* (prognostically) (Neethling, Potgieter and Visser 39–40 117 141–144; Van der Walt and Midgley 67 71 155 166; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 51 73 fn 62 111 n 91 131ff; Boberg *The law of delict I – Aquilian liability* (1984) 33–34 268ff). At present there is an on-going debate between Neethling and Potgieter, who champion "the cause" of those who hold the standard academic view (to which the present author also adheres), basing their arguments on the tenets of strict theory that has been evolving over many decades in academia and which has to no modest extent gradually attracted judicial recognition on the one, and Fagan, on the other side, who builds the main thrust of his arguments on the existing case law containing pronouncements which do not accord with the standard academic view, feeling obviously more bound by the rules pertaining to *stare decisis*. (In addition to the writings of these authors already referred to, see Neethling "The conflation of wrongfulness and negligence: Is it always such a bad thing for the law of delict?" 2006 *SALJ* 204; Neethling and Potgieter "Die regsoortuiging van die gemeenskap as selfstandige onregmatigheidskriterium" 2006 *TSAR* 609; Nugent "Yes, it is always a bad thing for the law – A reply to Professor Neethling" 2006 *SALJ* 557; Scott "Deliktuele vorderings teen die polisie: Nienakoming van 'n statutêre vervaltermyn en noodweersoorskryding – *Mugwena v Minister of Safety and Security* 2006 4 SA 150 (HHA)" 2007 *TSAR* 188 193–

194; Scott "Middellike aanspreeklikheid van die staat weens manipulasie van 'n tenderproses – *Minister of Finance v Gore NO* 2007 1 SA 111 (HHA)" 2007 TSAR 569 578–580. On 16 February 2008 a colloquium took place at the law faculty of the University of the Free State on the topic of determining wrongfulness and negligence in delict, in which members of the bench of the Supreme Court of Appeal, as well as a fair number of academics took part. In the opinion of the present writer that occasion demonstrated the existence of deep divides on these fundamental topics, rather than resolving key differences: the debate will continue unabated.)

Returning to the above quotation from Scott JA's judgment, the first sentence thereof asserts the fact, in respect of which there is now general consensus, that both wrongfulness and fault (negligence *in casu*) are indispensable elements of a delict. However, the theoretical difficulty with this sentence lies in the fact that it intimates that one can label an omission – as a species of human conduct – as negligent *before* having established the wrongfulness thereof. Although one can concede that the now famous and generally accepted definition of negligence in *Kruger v Coetzee* 430E–F does not, taken literally, postulate the existence of wrongfulness before the conduct in question is tested to determine whether negligence was present, the view that negligence as a form of fault points to the actor's *blameworthiness* is a logical indication that the issue of wrongfulness should be resolved before an inquiry is undertaken to determine negligence. Surely, how can someone be *blamed* in law for acting lawfully? The clearest and most concise statement of this truism, to my mind, is afforded by Van der Walt and Midgley:

> "The Supreme Court of Appeal appears to be vacillating on the issue as to whether wrongful conduct on the part of the defendant is logically an indispensable prerequisite for the existence of fault. Knowledge of the lawful nature of the conduct is implicit in a reasonable person's behaviour, and a reasonable person will not act unlawfully. So, if a reasonable person is someone who obeys the law at all times, then wrongfulness must be anterior to negligence. In our view, wrongful conduct on the part of the defendant is logically and indispensably a prerequisite for the existence of fault" (155).

Van der Walt and Midgley's lucid expression places them squarely amongst those who hold the standard academic view, which is founded upon the premise that there is a definite degree in difference in the reasonableness tests for wrongfulness and negligence – a premise which has earned (some of) its proponents the blame of exhibiting "blind faith" in their own preconceived opinions, rather than strictly following the lead of our Supreme Court of Appeal in its recent development of a basis for determining wrongfulness and negligence (see Fagan 2007 *SALJ* 285. Although Knobel "Die volgorde waarin die delikselemente onregmatigheid en skuld bepaal moet word" 2008 *THRHR* 1 concedes that *considerations of utility* may in some instances favour an approach where one may test for negligence before having established whether the defendant acted wrongfully, he nevertheless argues that, on a proper understanding of the elements of wrongfulness and negligence, wrongfulness is *in principle* always a prerequisite of fault: "As skuld in wese 'n verwyt is, kan dit 'n mens net tref as jy iets verkeerd gedoen het" (8)). Viewed from another angle, one could perhaps endeavour to make Scott JA's first sentence referred to compatible with the standard view by accepting that "negligent" refers: (a) not to the delictual element of "causal negligence", as this concept has to be understood if one adheres to the concrete or relative approach to the foreseeability tier of the reasonable person test (for a recent evaluation of which see Knobel "The feasibility of the

co-existence of concrete negligence and legal causation" 2007 *SALJ* 579 587ff); (b) but to conduct which is unreasonable in general and does not have a bearing on the *specific* harmful consequences flowing from the actor's conduct in the case at hand, but to harm *in general*, which is more in conformity with the abstract approach to foreseeability; or even (c) to conduct which can in non-technical or lay terms be branded as "negligent" (or "careless") where he or she acts in a certain way, for example driving at excessive speed past a group of small children without even in fact causing any harm ("negligence in the air"). This type of argument is to be found in Van der Walt and Midgley's criticism (67) of an aspect of the judgment in *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 441E (where the court expressed the opinion – essentially identical in meaning to the indication by Scott JA – that negligence is in itself not inherently unlawful, but that "it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful"):

> "The statement is acceptable if it is intended to mean that negligence does not 'presuppose' the material existence of wrongfulness (and therefore that wrongfulness must be established independently in advance). However, if it postulates a situation where a person could be negligent without the conduct being wrongful, then the approach is logically and theoretically untenable."

It is suggested that the recent assertions by Neethling and Potgieter 2006 *TSAR* 611 that the principles pertaining to the tort of negligence in English law and the concomitant doctrine of "duty of care" have exercised an influence on recent judgments, are above reproach. Their observation remains valid, even in spite of the warnings by the Supreme Court of Appeal itself that one should be cautious to avoid introducing English law rules relating to the tort of negligence into our law (eg by Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468C. There is ample proof of the pervading influence of the Anglo-American duty to take care doctrine in recent judgments: see eg *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA); *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (SCA)).

The second sentence in the quotation from Scott JA's judgment is commendable, even in the eyes of those who follow the standard academic approach, for it essentially contradicts the first sentence. Here the court includes all three components of the *diligens paterfamilias* test for negligence (viz (a) a failure (by the wrongdoer) to take reasonable steps; (b) to prevent; (c) reasonably foreseeable harm – see the present author's interpretation of the negligence test expounded in *Kruger v Coetzee* 430E–F: "Casino operator not liable for delictual act committed by one patron against another – *Tsogo Sun Holdings (Pty) Ltd v Qing-He Shan* 2006 6 SA 537 (SCA)" 2007 *THRHR* 501 505) to describe negligence which, in Scott JA's words, "will result in liability only if the failure is wrongful". This is a classic formulation on the basis of the determination of wrongfulness being anterior to that of negligence.

The third sentence which postulates the "reasonableness or otherwise *of imposing liability* for such a *negligent* failure" (my italics) as a determinant of wrongfulness in the first instance flies in the face of the second sentence, aligning, as it were, with the first sentence if one accords any technical meaning at all to the word "negligence". Secondly, the court now seems determined to continue the trend which emerged in the *Telematrix* case in which Harms JA, dealing with

liability for the negligent causing of pure economic loss, declared that "conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant" (468E). This follows even more clearly from a further observation made by Scott JA:

> "In this court counsel were agreed that the respondent was indeed obliged to act without negligence. In other words, given the foreseeability of harm to commuters resulting from criminal activity, it was agreed that the respondent owed commuters a legal duty to take such steps as were reasonable to provide for their safety and that the failure to take such steps *would render it liable in delict*" (145D–E, italics supplied).

It is obvious that Scott JA here expressed the wrongfulness of the respondent's failure to supply security personnel – to the presence *in casu* of which the litigating parties were agreed – as the fact that it would be "liable in delict". This method is described by Nugent JA in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122B; see also, for further examples of this trend, *Telematrix* 468E; *Trustees, Two Oceans Aquarium Trust v Kantley & Templer* 144I; *Steenkamp NO v Provincial Tender Board, Eastern* Cape 2006 3 SA 151 (SCA) 158G–160B; *Hirschowitz Flionis v Bartlett* 2006 3 SA 575 (SCA) 588D; *Black v Joffe* 182F; *Tsogo Sun Holdings (Pty) Ltd v Qing-He Shan* 540B–C; *Minister of Finance v Gore NO* 2007 1 SA 111 (SCA) 140D–E) as "one variation of the general test for wrongfulness", to the relief of Neethling and Potgieter (2007 *THRHR* 668 *in fine*; see also Neethling 2008 *TSAR* 319) over the fact that the new "test" does not appear to displace the established manner of determining wrongfulness, namely that an actual infringement of a legally protected interest *prima facie* establishes wrongfulness. The present writer shares this relief, seeing that doubt can be cast over the value of a source employed by Harms JA in the *Telematrix* case to which he seemingly accorded extraordinary importance, that is, a quotation by Fagan (2005 *SALJ* 597) from the famous formulation by Rumpff CJ in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597B of the *boni mores* test for wrongfulness in the context of an omission which reads that "die regsoortuiging van die gemeenskap verlang *dat die late as onregmatig beskou behoort te word en* dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree". Fagan lamentably omitted the italicised words, which omission would seem to have had a rather strong impact on the original meaning of Rumpff CJ's statement, in fact leaving it to be perfect authority for this "one variation of the general test for wrongfulness". (If Harms JA had in fact considered the full text of the relevant part of Rumpff CJ's judgment, it is suggested that it is inexplicable why he would have referred to Fagan's inaccurate reflection of that pronouncement.) In their case note on the *Telematrix* judgment, Neethling and Potgieter 2006 *TSAR* 614–616 draw attention to this omission on Fagan's part and the reliance placed in so many words by Harms JA on the former's interpretation of the *Ewels* case and commented on it in detail. It is indeed unfortunate that Fagan has not touched on this aspect of the criticism of Neethling and Potgieter in his latest rejoinder (2007 *SALJ* 285), following upon their latest joint "(self-) defence" of distinguishing between wrongfulness and negligence (2007 *SALJ* 280). Knobel 2008 *THRHR* 9 also refers to this aspect of Fagan's treatment of the *Ewels* judgment by labelling his methodology as erroneous "omdat sekere sinsnedes uit konteks gehaal word".

In having to conclude on this aspect of the judgment, one gains the impression, with a considerable measure of unease, that the modern English law of

negligence – particularly in the field of so-called "(pure) economic loss" cases – has impacted strongly on the turn of events in our Supreme Court of Appeal. The English literature in this field is overwhelming. Our law libraries abound with English textbooks and law reports. When materials are readily available (particularly in the English language) they will be consulted. This way of least resistance and abundant practical "advantage" could certainly be explained if one takes into account the work-load of busy practitioners and judges. However, this trend to think along the lines of the principles governing the English tort of negligence has attracted adverse criticisms through decades of academic publishing (see eg Van den Heever *Aquilian damages in South African law* (1944) 42ff; Price "The conception of 'duty of care' in the *actio legis Aquiliae*"1949 *SALJ* 171 269, "The duty to take care – return to the charge" 1959 *Acta Iuridica* 120; Van der Merwe and Olivier 129ff). I shall leave the matter at that by referring to a single *dictum* of Lord Denning MR in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27 (CA) 37 in this regard:

> "The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: 'There was no duty'. In others I say: 'The damage was too remote'. So much so that I think that the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss *should be recoverable, or not*" (italics supplied).

An author like Pannett *Law of torts* (1997) 9 uses this reference as authority for the proposition that it is the "proper function of the duty of care . . . to mark out the boundaries of what is and what is not recoverable". The likeness with the latest trend of development in the judgments of our Supreme Court of Appeal is so obvious that comment would certainly be superfluous.

It is a matter of some consolation to those adhering to the standard approach to wrongfulness that the Constitutional Court has as yet not attached its imprimatur to the Supreme Court of Appeal's variation to the general test for wrongfulness. Our highest tribunal in fact had the opportunity of doing so in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) 138D when handing down a judgment in the appeal from the judgment of the Supreme Court of Appeal in the *Steenkamp* case (*supra*). In his judgment Moseneke DCJ did not in so many words raise the problematic nature of the issue at hand, but merely, in general terms, described wrongfulness in the context of an omission as "the failure to fulfil a duty *to prevent harm* to another" (italics supplied), which duty should be ascertained by applying "the common convictions of society". In all fairness to the opponents of the standard approach in this regard, one cannot imagine a description of the general test for wrongfulness being more in conformity with the standard approach and, furthermore, coming from our highest tribunal.

3 3 The court's finding on negligence (and ignoring of the factual causation issue)

In spite of the fact that the court *a quo* had in essence dismissed the appellant's claim on the basis that the latter had failed to prove a causal nexus between the respondent's omission to provide adequate security personnel and the appellant's loss, Scott JA delivered the court's judgment on the sole basis of the issue of the presence or absence of negligence on the respondent's part, proceeding as follows:

> "The question in issue is therefore whether the appellant discharged the burden of establishing on a balance of probabilities that those measures were unreasonable in the circumstances and that had reasonable measures been taken the attack would not have occurred" (145E–F).

The court then continued to declare that the fact that a reasonable person would have foreseen the consequences does not necessarily imply that the steps taken by the respondent had been inadequate (referring to *Tsogo Sun* 541E–F). There is nothing remarkable in this statement: it is simply a reference to the well-known fact that in addition to the first (foreseeability) tier of the normal *diligens paterfamilias* test for negligence, a second (preventability) stage should follow in assessing a wrongdoer's conduct. Scott JA concluded that a failure to observe this would be "to impose on the respondent a burden of providing an absolute guarantee against the consequence of criminal activity on its trains" (145G), which is clearly untenable. It is noteworthy that this conclusion is in conformity with the warning issued by Horn J in the trial court – more in the context of finding a lack of wrongfulness on the respondent's part – that the Constitutional Court's finding (in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) 403C–G) that Metrorail owed commuters a duty of protection did not imply that the latter would now be strictly liable in delict for damage suffered by commuters where security personnel were absent, because such a proposition would "lead to serious erosion of the settled legal principles of delict" (169I of the trial court's judgment). The only comment which the present writer would venture in reflecting on this issue, is that Horn J had perhaps been too optimistic in assuming that our law of delict has such "settled principles" in cases like the present.

The finding on the facts by the Supreme Court of Appeal would seem to be crucial: As in the court *a quo*, Scott JA found that the appellant had proved that no security guard had been present in his own coach (145H) and that nothing about the appearance of the commuters waiting with the appellant on the station on that fateful day had given any indication that they were armed robbers (146E). Unlike in the trial court, it was found that the appellant had failed to prove that there had been a total lack of security personnel on the train (in the other coaches) (144C). Furthermore, Scott JA assumed, for purposes of deciding on the negligence aspect, that the presence of a security guard in the appellant's coach would have served as a sufficient measure to prevent the attack on him (146A), thus, in fact, by implication finding that a factual causal nexus had been proved by the appellant – in contrast to the trial court's crucial finding that the element of factual causation had not been proved. This enabled Scott JA to "open", as it were, the inquiry into the preventability stage of the reasonable person test for negligence, that is, whether a reasonable person would have taken reasonable steps to prevent the damage, which the respondent had failed to do. This methodology is clearly reflected in the following exposition by the court:

> "[T]he question remains whether it would be reasonable to require the respondent to have a security guard, whether armed or otherwise, in each and every coach of every train. If regard is had to the large number of railway coaches employed by the respondent to convey commuters many kilometres each day, such a requirement would, in my view, exceed by far the precautionary measures that could reasonably be expected of an enterprise operating a commuter train service. No doubt in particular circumstances it may be reasonable to expect the respondent, regardless of the cost, to place armed security guards in each and every coach of a train travelling on a particular line. Typically the need for such special precautions could arise if a particular line had been identified as being particularly dangerous

> on account of repeated criminal activity. *But there was no evidence* to suggest that this was so in the case of the line from Dunswart to Benoni . . . But, as I have indicated, the evidence of the appellant makes it clear that the attack could only have been averted by having an armed security guard in that particular coach. *In the absence of further evidence to justify the need for a security guard in each coach*, the failure on the part of the respondent to ensure that there was such a security guard present in each coach does not give rise to an inference of negligence" (146A–D H–I; italics supplied).

The italicised parts of this quotation affords an indication towards the more benign attitude of the Supreme Court of Appeal to the appellant's failure to present sufficient evidentiary material to prove his claim, in contrast to that of the trial court which interpreted the main principle of the law of evidence – namely that "he who asserts must prove" – more strictly in the instant case.

It is suggested that the Supreme Court of Appeal in fact gradually moved, from an initial stance of an *acute awareness of the issue of a lack of factual causation* (145H–I), to a position of *assuming* a sufficient causal link (146A), to arrive finally at a *total acceptance* that a factual causal link had been established (146H) within the space of little more than one printed page of its judgment. This shows that its treatment of the "sub element" of preventability (as part of the negligence element) entails the "absorption" of the element of factual causation by that of negligence. Such an approach constitutes a deviation from even the most recent judgments of the same court, where causation is mentioned as one of the basic elements of delict (see eg *Tsogo Sun* 539H 541G–H), as well as from the English law of tort in general (see Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort law* (2008) 30) and the English law of negligence in particular (see Dugdale *Clerk and Lindsell on torts* (2006) 383).

The question which now arises, is: What happens if the appellant can adduce further evidence to convince a court that the circumstances had justified, by applying the tenets of reasonableness, the placing of an armed security guard on each and every coach of every train carrying commuters on the line in question? It would seem inevitable, on the footing of Scott JA's final conclusion, that negligence will then be proved, because the respondent had failed to take those reasonable precautions. Will that imply the respondent's liability? It is suggested that such will not be the case, as the issue of factual causation will not yet have been resolved in conformity with the established rules of delictual liability. Only if the further evidence will at the same time and in addition provide proof of the existence of a factual causal nexus between the respondent's omission and the appellant's loss – in the sense that a notional "insertion" of positive conduct in place of the omission on the respondent's part would have averted the appellant's loss (see eg Neethling, Potgieter and Visser 167–168 esp references to case law in fnn 53 and 54; Van der Walt and Midgley 199–200) – will there be liability on the respondent's part. This is well illustrated by the judgment of Corbett JA in *Minister of Police v Skosana* 1977 1 SA 31 (A):

> "The negligent delay in furnishing the deceased with medical aid and treatment, for which Davel and Mahela [the policemen under whose supervision he fell] were responsible, can only be regarded as having caused or materially contributed to his death if the deceased would have survived but for the delay. This is the *crucial question* and it necessarily involves a hypothetical inquiry into what would have happened had the delay not occurred" (35E; italics supplied).

In the present writer's opinion it is inexplicable how it came about that the issue of factual causation fell by the wayside in the judgment under discussion.

4 Conclusion

One gains the impression that anything which the appellant may have gained by the alteration of the trial court's judgment to one of the granting of an order of absolution from the instance is more in the nature of a consolation prize, seeing that even the order as to costs went fully against him (147C). It is to be hoped that the question posed in the introduction above in respect of the importance of the differences between the judgments of the court *a quo* and the Supreme Court of Appeal can be answered by stating that they are of an insignificant nature. It is *sincerely* to be hoped that the latter tribunal did not consciously establish a new method of dispensing with the independent delictual element of factual causation by absorbing it into the preventability tier of the *diligens paterfamilias* test for negligence. In view of the court's total disregard for the terminology attaching to the test for factual causation, the present writer is of the opinion that such novel methodology was never in the court's contemplation. At its worst this omission should be seen for what it really is – a mere error on the part of the court in its *ratio decidendi* in reaching a conclusion which is compatible with one's sense of justice and which could just as well have been reached on the basis of the appellant's failure to prove a factual causal nexus between the respondent's wrongful omission and his loss.

For those South African legal academics who still have faith in the structure and methodology of the law of delict which have been established and developed over many decades by the courts and academics alike and which stand reflected throughout the pages of all the major South African textbooks on the law of delict, the judgment of Scott JA will doubtlessly be a disappointment. It is, as it were, to them a further brick in the emerging wall of judgments tainted by the trappings of the English tort of negligence and the concomitant concept of "duty to take care".

Without embarking upon an extensive evaluation of the application of the doctrine of *stare decisis* in present South African law (on which a modern treatise would indeed be valuable, seeing how our courts go about in applying precedent nowadays: see eg *Linvestment CC v Hammersley* 2008 3 SA 283 (SCA) in which Heher JA deviated from a previous judgment of the Appellate Division essentially for equitable reasons; *Gouda Boerdery BK v Transnet supra* where Scott JA ignored the point of view held in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833 that the determination of wrongfulness by enquiring into the breach of a legal duty "is not at all concerned with reasonable foresight"), it is suggested that one should be very careful, when developing the theoretical foundations of our modern law of delict, not to utilise the argument that one's opinions are in perfect conformity with the latest judgments of some or other court. On many occasions the court, in proposing a new doctrine or interpreting existing rules and principles, is led by the facts of the case at hand, as well as by the arguments put forward by counsel (which may sometimes be of exceptionally high standard, but on other occasions of little assistance at all): it is, indeed, manifestly unfair to expect of an overworked judge to keep all the scientific intricacies of a specific branch of law in mind when having to decide not only on the facts of the instant case, but also on the reasons for judgment. It is my considered opinion that this is the reason why one cannot interpret judgments of any court in the same fashion as one would go about interpreting statutes. That would be to accord too much weight to judicial pronouncement – and this statement I make with the greatest deference to the judges sitting in our courts.

On the whole, it would appear that members of our judiciary are sometimes reluctant to refer to modern academic writers at home, opting rather to quote foreign academic works (the most notable recent example being the failure of Harms JA in *Telematrix* 468A to refer, for the basic proposition of the law of delict, to which principle he accorded great significance, that harm rests where it falls ("*res perit domino*") even to a single South African textbook – cf Neethling and Potgieter 2006 *TSAR* 610 *in fine*). Understandably this usage, akin to that of English judges who are averse to referring to textbooks of living authors, is at least perplexing and at most irksome to academic lawyers. The recent dialogue between members of the bench of the Supreme Court of Appeal and academics on the topics of wrongfulness and negligence, already referred to (see 3 2 above), truly constitutes a wholesome development which can ultimately only benefit the overall development of our law in general and our law of delict in particular. This can go a long way in dispelling the type of criticism of the want of co-operation between the bench and academia, which is so splendidly formulated by the English authors Deakin, Markesinis and Johnston (84–86):

> "The gap between academic tort law and judge's tort law is also made obvious by the absence of any real dialogue – at any rate until recently – between the Bench and universities of the kind which, for historical reasons, we find in other countries. This lack of effective communication is aggravated by three factors.
>
> *First*, academics in this country, unlike in the United states, are too quick to accept without questioning judicial utterances on a particular subject. One writer of a learned monograph on the workings of the House of Lords observed that the fact that academic opinion fails to impress judges is in part because of their 'own reticence at expressing their criticisms in a forceful manner lest it be perceived as disrespectful' . . . [T]he academic environment is also not without its share of blame, young lecturers often instilling in their students an unwarranted degree of deference to judges. All of the above, if not wrong, is, at the very least, not in tune with the spirit of our times (as well as wise past sayings) which (rightly) have always encouraged thinking people 'to probe everything and keep the best' . . .
>
> *Second*, academic criticism is rarely read unless it is published in the literally one or two journals that most judges read (or glance at?). Otherwise, such writings are unlikely to come to the attention of most judges, unless counsel put these works before them in court.
>
> *Finally*, the insights that judges and academics have into the law are very different. Thus Lord Goff – one of the small number of judges who, through his own work judicially and extra-judicially, has tried hard to bridge this gap – had this to say of this phenomenon:
>
> > 'The judge's vision of the law tends to be fragmented; so far as it extends, his vision is intense; and it is likely to be strongly influenced by the facts of the particular case . . . jurists on the other hand, do not share the fragmented approach of the judges. They adopt a much broader approach, concerned not so much with the decision of a particular case, but rather with the place of each decision in the law as a whole. They do not share our intense view of the particular; they have rather a diffused view of the general. This is both their weakness and their strength.'"

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